TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 117.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

ALICE BROOKE.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JULY 3, 1907.

(20,776.)

(20,776.)

SUPREME COURT OF THE UNITED STATES.

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Supreme Court of the District of Columbia

Law No. 48870.

ALICE BROOKE, PETITIONER

vs.

THE DISTRICT OF COLUMBIA, RESPONDENT.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

BE IT REMEMBERED, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause to wit:

1 *Petition.*

Filed October 17, 1906.

In the Supreme Court of the District of Columbia.

Law No. 48870.

ALICE BROOKE, PETITIONER

vs.

THE DISTRICT OF COLUMBIA, RESPONDENT.

To the Supreme Court of the District of Columbia, holding a Circuit Court:

The Petition of Alice Brooke respectfully represents to the Court as follows:

First: That she is now a resident of Silver Spring in the State of Maryland. That the respondent is a Municipal Corporation duly created.

Second: That petitioner is the owner in fee simple of sub lot numbered twenty-six (26) in square numbered seven hundred and seventy (770) in said District, improved by five dwelling

houses numbered 1243, 1245, 1247, 1249 and 1251 Third Street, Southeast.

Third: By Act of Congress entitled "An Act to provide for the drainage of lots in the District of Columbia," approved May 19, 1896, it is provided that each original lot or subdivisional lot situated on any street in the District of Columbia where there is a public sewer shall be connected with said sewer * * * and if such original lot or subdivisional lot is situated on any street in said District where there is a public sewer and watermain, such original lot or subdivisional lot shall
2 be connected with said sewer and also with said watermain.

Sections 2 and 3 of said Act require the Commissioners of said District to notify the resident owner or owners of every lot required by said Act to be so connected, to have said work done, and in the event of the neglect to make such connections within a prescribed time such owner or owners is to be deemed guilty of a misdemeanor and on conviction in the Police Court of said District is to be published by a fine for each day after the expiration of the limited prescribed time till the connections are made.

By the 4th section of said Act it is provided that in case the owner of such lot being a non resident of the District of Columbia cannot be found within said District, the said Commissioners are to give notice, by publication twice a week for two weeks in some daily newspaper published in the city of Washington, to such owner directing the connection of such lot with such sewer or sewer and watermain, as the case may be, with the proviso, however, that if the residence or place of abode of said non-resident owner be known, or ascertainable on reasonable inquiry, then a copy of the aforesaid notice is to be mailed to said non resident, legal postage prepaid, addressed at his said residence or abode, and in case such owner shall neglect to comply with the notice within thirty days, said Commissioners are to cause such connections to be made, the expense to be paid out of the emergency fund; such expense with the necessary expenses of advertisement shall be assessed as a tax against such lot, which tax shall be carried on the regular tax roll of
3 the said District and shall be collected in the manner provided for the collection of other taxes.

Fourth: By virtue of said Act it is claimed on the part of the respondent, that certain connections, respecting said parcel of land, were made with the watermain and sewer in the street on which said lot fronts and respondent has assessed or caused to be assessed the charge therefor at the sum of $470.77 and have caused said assessment to be placed against said parcel of land

on a book in the office of the Assessor of Taxes for said District, designated "Special Reimbursable Tax Ledger" in the name of your petitioner as owner; said assessment or tax against said lot will appear by bill furnished petitioner by the Collector of Taxes for said District hereto annexed as part hereof.

Fifth: Petitioner avers that said assessment or tax against said lot or parcel of land is illegal in its entirety and beyond the power of the respondent to assess or collect, in this that respondent had no jurisdiction of aforesaid property under aforesaid Act of Congress, to require the connection of said property, or cause the same to be done, with the sewer and watermain in the street in front of said property; the said Act of Congress being unconstitutional and void because it discriminates between owners of real estate in said District; the said Act not being uniform and capable of universal enforcement.

Sixth: Upon information and belief petitioner further avers that assuming said Act is valid, which is denied, still said assessment or tax is void in its entirety in this that the provisions of the fourth section of said Act—which are a prerequisite to the causing of said work to be done by the Commissioners—
4 were not complied with in the following particulars—

(a) It does not appear that petitioner was a non-resident at the time the work was done for which aforesaid assessment was made or that she could not be found in said District.

(b) It does not appear that the Commissioners of said District, either as a board of individuality, gave the legal and official notice to the owner of said property as is required by said Act.

(c) It does not appear what the different items are, in connection with said work, which go to make the assessment levied against said property, nor does it appear that proper proposals were obtained after proper notice or that the contract for the work was given to the lowest bidder, or that the contract given was made by the Commissioners of said District sitting as a board, all of which petitioner contends is absolutely necessary for a valid assessment.

(d) That in and by the purported published notice to said petitioner it is not stated when the period of thirty days within which the connections were to be made would begin to run.

(e) The aforesaid assessment has not been placed on the regular tax rolls of said District.

Seventh: That petitioner, notwithstanding she has always, during her ownership of said property, which has been continuously since August 8, 1896, kept the same in good repair and condition, and promptly and regularly paid the taxes and

5 assessments legally levied thereon, it was only recently she learned that respondent carries the aforesaid assessment or tax on its said ledger against said property, and said property is liable to be sold for the non-payment thereof, and petitioner respectfully contends that the said Act of Congress is unconstitutional and void, and that said tax or assessment is illegal and void, not only because the Act is unconstitutional and void under which the work is alleged to have been done, but also for the reason that, assuming said Act to be valid, the Commissioners did not comply with the terms and conditions of said Act as above set forth, and that by reason of said erroneous and illegal assessment standing on respondent's said record in its office against her said property she is injured and wronged in her right of property and has no appeal from said illegal action of said respondent.

Wherefore, the premises considered, petitioner respectfully prays:

That the United States Writ of Certiorari commanding the District of Columbia, respondent herein, to certify immediately to this Court, a copy of said Statute or Act of Congress and of each and every record and paper, and part of record and paper, in its custody, relating in any manner to charges or taxes or assessments assessed in the name of petitioner against any part of the real estate hereinbefore referred to, purporting to be charges, assessments or taxes levied under the Act of Congress of May 19, 1896, titled as aforesaid, together with a full copy of every notice, return, advertisement, contract, minutes of

6 board meeting or meetings of said Commissioiners, specification, drawing, blue-print, assessment entry on tax book, name of tax book, and of such minutes or proceedings had by it concerning said matter.

2. That upon coming in of said return, after hearing, the alleged assessment or charge or tax be quashed and annulled by the judgment of this Honorable Court.

3. That petitioner may have such other and further relief in the premises as the justice of the case may require and to the Court seem proper.

ALICE BROOKE.

JNO. RIDOUT,
GEO. C. GERTMAN,
Attorneys for Petitioner.

CITY OF WASHINGTON, *District of Columbia, ss:*

I, Alice Brooke, do solemnly swear that I have read the above petition by me subscribed and know the contents thereof; that

the facts therein stated upon my personal knowledge are true and those stated upon information and belief I verily believe to be true.

ALICE BROOKE

Subscribed and sworn to before me this 17th day of October, A. D. 1906.

CLARENCE F. DONOHOE,
Notary Public, D. C.

[SEAL]

7 *Rule to Show Cause.*

Filed October 17, 1906.

In the Supreme Court of the District of Columbia.

At Law, No. 48870

ALICE BROOKE,

vs.

THE DISTRICT OF COLUMBIA.

Upon the petition filed herein it is this eighteenth day of October, 1906, ordered:

That the respondent show cause, if any it has before this Court on Friday, October 26, 1906, why the prayer of said petition for a writ of certiorari should issue should not be granted; provided a copy of this order be served upon the said respondent on or before October 20th 1906.

THOS. H. ANDERSON,
Justice.

Marshal's Return.

Served copy of the within order on Henry B. F. Macfarland one of the Board of Commissioners of the defendant—Oct. 18, 1906.

AULICK PALMER,
Marshal.

8

8 PART I.

Answer to Rule.

Filed November 23, 1906.

In the Supreme Court of the District of Columbia.

At Law, No. 48870.

ALICE BROOKE, Petitioner,

vs.

DISTRICT OF COLUMBIA.

The return of the respondent, the District of Columbia, to the rule issued in the above entitled cause respectfully shows as follows:

1 and 2. It admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Respondent further says that the matter set forth in paragraph three are matters of law, which are proper to be decided by the Court and which the petitioner is not required to answer.

4. Respondent admits the allegations of paragraph four.

5. Respondent says that the said assessment or tax complained of is a legal and proper tax and the defendant had a right to make the same against the property involved and to require the said property to be connected with the sewer and the water-main in the street in the front thereof; that the said Act of Congress is constitutional and legal.

6. Respondent asserts the said assessment or tax as a proper or a legal tax, and that provisions of the said Act of Congress referred to in the said petition, particularly those of the 4th section of the said Act have been strictly complied with.

a. Respondent says that diligent search was made by
9 the officers and agents of the respondent to find the said petitioner within the District of Columbia, but she could not be found there after such diligent search. That the petitioner was informed and believed and still believes that the said petitioner was at the time of the performance of the acts complained of, and is now a citizen of the State of Maryland, and resides and did reside at Silver Hill, Maryland.

b. Respondent further says that the Commissioners of the District of Columbia through their officers and agents did give

legal and official notice to the said petitioner as required by the said Act of Congress. That notice was given by publication as required by the said Act and said notice was also sent to the said petitioner at Silver Hill, Maryland, postage prepaid by registered letter, on March 14, 1903, and was received by the said petitioner on March 16, 1903; the registry return receipt with the signature of the petitioner, a copy of which is filed herewith as exhibit hereto and is prayed to be read as a part hereof, and the original thereof will be exhibited to the Court on the hearing of said rule.

c. That the respondent caused certain plans and specifications for said work, to connect the said premises with the water-main and sewer, to be prepared and bids and proper proposals thereunder were duly called for by public advertisement, and a number of bids were made by different individuals for the said work, and the contract was duly let to the lowest bidder by the Commissioners for the said District, acting as a Board of Commissioners.

10 d. They deny the allegation of this paragraph, that the published notice to the petitioner notifying her to connect the said premises with the said water-main and sewer, and called upon her to do so "within thirty days from this notice."

e. That the said assessment complained of has been placed upon the regular tax-roll of the District of Columbia, which consists of ledgers, and said assessment is contained in the "special reimbursable tax-ledger" which is the proper roll on which to place said assessment, and is the only place where such assessments are carried.

7. In answer to paragraph 7, respondent says that the matters therein contained are immaterial, or matters of law. In answer to that portion of said paragraph which alleges that the Commissioners did not comply with the terms and conditions of said Act, respondent says that they did comply with the terms and conditions of said Act and petitioner is now barred by Statute of Limitations, the said assessment having been made on September 9, 1903.

8. As a further return to said petition, respondent files herewith as a part hereof marked "Return Part II" copies of record in the possession of your respondent pertaining to the said assessment, to wit:

1. Registry return receipt with signature of petitioner.

2. Copy of advertisement, notifying petitioner to connect with water-main and sewer.

3. Order of Commissioners to have the work performed.

4. Request of Inspector of Plumbing that bids for the work be advertised for.

5. Copy of the advertisement asking for bids for the
11 work.

6. List of bidders and prices bid.

7. Order of Commissioners accepting bid of Freund & Anderson.

8. Plats of premises (2).

9. Copy of assessment.

HENRY B. F. MACFARLAND,
HENRY L. WEST,
JOHN BIDDLE
Commissioners, D. C.

E. H. THOMAS,
F. H. S., Atty.

DISTRICT OF COLUMBIA, *ss:*

Henry B. F. Macfarland, Henry L. West and John Biddle, being duly sworn, say they are the Commissioners for the District of Columbia, and have read the return subscribed as such Commissioners and know the contents thereof; that the matters therein stated on their personal knowledge are true, and those stated on information and belief, they believe to be true.

HENRY B. F. MACFARLAND,
HENRY L. WEST,
JOHN BIDDLE,
Commissioners, D. C.

Subscribed and sworn to before me this ninth day of November, 1906.

WILLIAM TINDALL,
[SEAL] *Notary Public, D. C.*

12 PART II.

Filed November 23, 1906.

Copy.

Registry Return Receipt. Form No. 1548

Received from the Postmaster at.....3/14 03.....

Registered (Parcel) No. 16943..FROM POST OFFICE AT WASHINGTON, D. C.

Addressed to.....Miss Alice Brook.....
(Name of addressee)

Date.. March 16, 1903.

When delivery is made to an agent of the addressee, both addressee's name and agent's signature must appear in this receipt.

.....Miss Alice Brook.....
(Signature or name of addressee.)

.....
(Signature of addressee's agent.)

A registered article must not be delivered to any one but the addressee, except upon addressee's written order. When the above receipt has been properly signed, it must be postmarked with name of delivering office and actual date of delivery and mailed to its address, without envelope or postage.

This card must be neatly and correctly made up and addressed to the postoffice where the article is registered.

The postmaster must deliver the registered article, must see that this card is properly signed, postmarked, and mailed to the sender.

(Washington, D. C.)
(Rec'd. Mar. 17)
(9 P. M.)
(1903.)

Postmark of Delivery Office.

(Silver Hill)
(Mar. 17)
(1903)
(Md.)

And date of Delivery.

POST OFFICE DEPARTMENT.
Official Business.
Penalty of $300 for private use.
RETURN TO
Name of sender.....Health Dept.
Street and number of D. Commrs.
or Postoffice Washington, D. C.
Box.

13 Filed November 23, 1906.

EXECUTIVE OFFICE
COMMISSIONERS OF THE DISTRICT OF COLUMBIA.
WASHINGTON.

November 3, 1906.

I hereby certify that the following notice to connect sewer and watermain, was published in the Washington Evening Star, on March 11th, 12th, 18th and 19th, 1903:

OFFICE OF THE COMMISSIONERS OF the District of Columbia, Washington, March 11, 1903. Notice to connect lots in the city of Washington, District of Columbia, with sewers and watermains: To * * * Alice Brooke, owner of lot 26, in square 770 (embracing premises known as 1243, 1245, 1247, 1249 and 1251 3d street southeast); * * * You, and each of you, are hereby notified to connect the lot or lots above mentioned, and owned by you, respectively, with the public sewer and watermain in such a manner that any and all drainage of such lots, whether water or liquid refuse of any kind, shall flow into said sewer; the work to be done in accordance with the regulations governing plumbing and house drainage in the District of Columbia, and in case you shall fail or neglect so to do within thirty days from this notice the Commissioners of the District of Columbia will cause such connection to be made, and will assess the expense of the same, together with the expense of this advertisement, as a tax against each lot aforesaid, respectively, according to the provisions of the Act of Congress entitled "An act to provide for the drainage of lots in the District of Columbia," approved May 19, 1896. H. B. F. MACFARLAND, HENRY L. WEST, JOHN BIDDLE, Commissioners of the District of Columbia.

WILLIAM TINDALL,
Secretary to the Board of Commissioners of the District of Columbia.

14 Filed November 23, 1906.

C. O. 240267-I

EXECUTIVE OFFICE
COMMISSIONERS OF THE DISTRICT OF COLUMBIA.
WASHINGTON, May 19, 1903.

Ordered:

That the owners of the following described premises having been notified by publication, in accordance with law, to connect their premises with the public sewer and watermain and having failed to make such connections within the period specified by law, the necessary work will be done by the District of Columbia in so far as the appropriation to provide for the drainage of lots in the District of Columbia will permit and the cost thereof will be assessed against the respective premises as provided by law, viz:

Lot 26, square 770 (embracing premises known as 1243, 1245, 1247, 1249, and 1251 3rd street, southeast), Alice Brooke, owner.

* * * * *

Official copy furnished Engineer Department.

By order,

WILLIAM TINDALL,
Secretary.

[SEAL]
Official Copy
W. TINDALL, *Sec'y.*

15 Filed November 23, 1906.

OFFICE OF THE
ENGINEER COMMISSIONER OF THE DISTRICT OF COLUMBIA,
WASHINGTON

June 18th, 1903.

THE HONORABLE COMMISSIONERS, (through Capt. Harding.)

GENTLEMEN: I have the honor to request that the enclosed advertisement be placed in the daily papers. The work proposed to be contracted for is ordered under date of May 19th, 1903, (C. O. 240267-1) E. D. 44291, and the cost of the same will be assigned against the property under the provisions of the Act for the "Drainage of Lots." It is also presumed that the cost for advertising may be equitably charged against the property.

Very respectfully,

H. B. DAVIS,
Inspector of Plumbing, D. C.

[SEAL]
Official Copy
W. TINDALL, *Sec'y.*

16 Office, Commissioners, District of Columbia, Washington, D. C., June 19th, 1903, SEALED PROPOSALS will be received at this office until 12 M, Saturday, June 27th, 1903, for connecting certain premises with sewer and watermain. Forms, specifications and necessary information may be obtained at this office. Henry B. F. Macfarland, Henry L. West, John Biddle, Commissioners of the District of Columbia.

[SEAL]
Official Copy.
W. TINDALL, *Sec'y.*

17 Filed November 23, 1906.

Bids for the work of connecting premises 1243 to 1251, inclusive, 3d St. S. E., being lot 26, Square 770, as per advertisement of March 11-19, 1903, were received as follows:

NAME	AMT. OF BID.
Wm. Rothwell & Son	$627.00
The E. F. Brooks Co.	593.20
Hutchinson & McCarthy	575.00
Dunegan Plumbing Co.	548.
Freund & Anderson	470.77

18 Filed November 23, 1906.

E. D. 44913

EXECUTIVE OFFICE
COMMISSIONERS OF THE DISTRICT OF COLUMBIA,
WASHINGTON.

June 30, 1903.

Ordered:

That the proposal of Freund and Anderson under date June 26, 1903, to furnish all the necessary materials and labor and perform the following work in strict accordance with the specifications, at the prices given below, are hereby accepted:

* * * * *

For connecting 5 premises Nos. 1423 to 1251, inclusive, 3rd street, S. E., located on lots 26, square 770, with public sewer and water main; furnishing for each premises a water closet (Class I), a water closet enclosure complete and a cesspool; new G. I. gutters and down spouts on rear of 1245 to 1251, inclusive, and rehanging gutter on rear of 1243; a 4-inch house sewer and 3-4″ water supply line will be installed in 3 premises and repairs to fenses will be made, together with all fittings, connections, materials and labor, necessary to complete, for the sum of $470.77.

Official copy furnished Engineer Department.

By Order:

WILLIAM TINDALL,
Secretary.

[SEAL]

M
Auditor
Eng'r. Dept.
Freund & Anderson

Official Copy,
W. TINDALL, *Sec'y.*

19 Filed November 23, 1906.

OFFICER OF ASSESSOR, D. C.

Book. S. R. Tax September 9, 1903.
Folio 100

ALICE BROOK-

TO THE DISTRICT OF COLUMBIA, DR.

Square 770, Lot Sub 26
For work done under Act of Congress approved—
May 19, 1896
Description of work—Connecting premises with water-main and Sewer.

$470.77

Interest at.....per cent from.....

Total.....

P

Received payment,

.....
Collector of Taxes.

20 Supreme Court of the District of Columbia.

Friday, December 7, 1906.

Session resumed persuant to adjournment, Hon. Thos. H. Anderson, Justice, presiding.

* * * * *

No. 48870 At Law.

ALICE BROOKE, Petitioner,

vs.

THE DISTRICT OF COLUMBIA, Respondent.

This cause came on to be heard upon the petition, the rule to show cause issued thereon, the answer of respondent thereto, and after argument thereon by counsel for the respective parties, was submitted to the Court for its consideration. Whereupon it is ordered that the prayer of the petition herein for a Writ of Certiorari be and is hereby granted, and said writ is hereby ordered to issue in accordance therewith.

21 *Stipulation for Hearing, etc.*

Filed January 11, 1907.

In the Supreme Court of the District of Columbia.

Law No. 48870.

ALICE BROOKE,

v.

THE DISTRICT OF COLUMBIA.

It is hereby stipulated that the Respondent will on or before Friday, January 18, 1907, file herein its return to the Writ of Certiorari heretofore issued herein, and that on said 18" day of January, 1907, said cause may, if agreeable to the Court, be heard upon its merits, and that copies of the records filed herein shall stand in the place and stead of the originals.

JOHN RIDOUT,

Atty. for Respondent,
E. H. THOMAS,
F. H. S.

Attys. for Pet.

22 *Motion.*

Filed January 16, 1907.

In the Supreme Court of the District of Columbia.

Law No. 48870.

ALICE BROOKE,

vs.

THE DISTRICT OF COLUMBIA.

Now comes the petitioner by her Attorneys, John Ridout and George C. Gertman, and on the return of the respondent herein to the Rule to show cause moves the Court to enter a judgment quashing the tax complained of in the petition herein.

JOHN RIDOUT,
GEO. C. GERTMAN,
Atty's. for Petitioner.

Jan. 11, 1907.

23 *Return to Writ of Certiorari.*

Filed January 21, 1907.

In the Supreme Court of the District of Columbia.

At Law, No. 48870.

ALICE BROOKE, ?

v.

THE DISTRICT OF COLUMBIA.

Now comes the defendant, by its attorney, and for return to the writ of certiorari herein, adopts in full the return to the rule to show cause, heretofore filed in this case.

E. H. THOMAS
F. H. STEPHENS,
Attorneys for Defendant.

24 Supreme Court of the District of Columbia.

Friday, February 8, 1907.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice, presiding.

* * * * *

No. 48870 At Law.

ALICE BROOKE, Petitioner,

vs.

THE DISTRICT OF COLUMBIA, Def't.

This cause having been argued by counsel for and submitted to the Court on the Writ of Certiorari and the return thereto filed herein by Respondent, it is by the Court, this Eighth day of February, 1907, adjudged that the tax or assessment of $470.77 levied against sub lot numbered twenty-six (26) in square numbered seven hundred and seventy (770), in said District, belonging to Petitioner, for connecting said property with water and sewer, is illegal and void, and said tax or assessment for said work is hereby quashed and held for naught

and respondent is forthwith directed to cancel the same on its tax records.

From the aforegoing the respondent in open court, notes an appeal to the Court of Appeals.

25 *Order for Transcript of Record.*

Filed February 13, 1907.

In the Supreme Court of the District of Columbia.

At Law, No. 48870.

ALICE BROOKE,

v.

DISTRICT OF COLUMBIA.

The Clerk will please prepare a transcript of the record in the above entitled case, for the Court of Appeals, consisting of:

1. The petition.
1. The rule to show cause why the writ should not issue.
3. The answer to the rule; two parts
4. Order directing the writ to issue
5. Answer to the writ
6. Motion to quash return
7. Judgment, quashing return and directing cancellation of the assessment, and
8. The appeal noted in open court
9. This order for transcript.

E. H. THOMAS,
F. H. STEPHENS,
Attorneys for the Defendant.

26. Supreme Court of the District of Columbia

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 25, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, a copy of which is made part of this transcript, in cause No. 48870 At Law, wherein Alice Brooke, is Petitioner, and The District

of Columbia, is Respondent, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 20th day of March, A. D., 1907.

JOHN R. YOUNG,

[SEAL] *Clerk.*

[Endorsed on cover:] District of Columbia, Supreme Court. No. 1770. The District of Columbia, Appellant *vs.* Alice Brooke. Court of Appeals, District of Columbia. Filed Mar. 21, 1907. Henry W. Hodges, Clerk.

ADDITION TO RECORD PER STIPULATION OF COUNSEL.

COURT OF APPEALS, DISTRICT OF COLUMBIA:

APRIL TERM, 1907.

No. 1770.

No. 2 Special Calendar.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

ALICE BROOKE.

FILED APRIL 6, 1907.

Court of Appeals of the District of Columbia.

No. 1770.

DISTRICT OF COLUMBIA,

v.

ALICE BROOKS.

The parties hereto, by their counsel, consent that the transcript of record filed in the above case may be amended by adding thereto the writ of certiorari issued by the court below, and

that the said writ shall be treated as if it had been originally filed with the transcript of record herein.

E. H. THOMAS,
F. H. STEPHENS,
Attorneys for District of Columbia.

JNO. RIDOUT,
GEO. C. GERTMAN,
Attorneys for Alice Brooks.

Writ of Certiorari.

In the Supreme Court of the District of Columbia.

Law No. 48870.

ALICE BROOKE, Petitioner,

vs.

THE DISTRICT OF COLUMBIA, Respondent.

The President of the United States of America to the District of Columbia, Greeting:

You, the District of Columbia, are commanded to certify to this Court immediately, a copy of each and every part of the record in your custody relating in any manner to a charge or charges, tax or assessment, in the name of Alice Brooke, against sublot No. Twenty-six (26) in Square numbered Seven hundred and seventy (770) in the City of Washington, District of Columbia, for connecting said Lot with sewer and water main, made and done under supposed authority of the Act of Congress approved May 19, 1896, titled "An Act to provide for the drainage of lots in the District of Columbia," including all notices, returns, advertisements, contracts, specifications, drawings, blue prints, assessments, entry or entries on tax book, name of tax book, and all minutes or proceedings had by said Respond-

ent or the Commissioners of the District of Columbia, as a Board or otherwise, concerning said matter.

Witness the Honorable HARRY M. CLABAUGH, Chief Justice of the Supreme Court of the District of Columbia, this 7th day of December, A. D. 1906.

[SEAL.] J. R. YOUNG, *Clerk*,
By FRED. C. O'CONNELL, *Asst. Clerk*.

Marshal's Return.

Served copy of the within writ on the District of Columbia by service on Henry L. West, one of the Commissioners of said District of Columbia, personally, Dec. 7, 1906.

AULICK PALMER,
Marshal.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, JOHN R. YOUNG, Clerk of the Supreme Court of the District of Columbia, do hereby certify the foregoing to be a true copy of the WRIT OF CERTIORARI, issued on the 7th day of December, A. D. 1906, in cause No. 48870, AT LAW, wherein ALICE BROOKE, is Petitioner, and THE DISTRICT OF COLUMBIA, is Respondent, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court at the City of Washington, in said District, this 5th day of April, A. D. 1907.

J. R. YOUNG, *Clerk*.
By ALF. G. BUHMAN, *Asst. Clk*.

[Endorsed:] No. 1770. The District of Columbia, Appellant, *vs.* Alice Brooke. Addition to Record for Stipulation of Counsel. Court of Appeals, District of Columbia, filed Apr. 6, 1907. Henry W. Hodges, Clerk.

WEDNESDAY, *April 10th*, A. D. 1907.

No. 1770.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
ALICE BROOKE.

The argument in the above entitled cause was commenced by Mr. F. H. Stephens, attorney for the appellant, and was continued by Mr. John Ridout, attorney for the appellee, and was concluded by Mr. F. H. Stephens, attorney for the appellant.

No. 1770.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
ALICE BROOKE.

Opinion.

(Mr. Justice ROBB delivered the opinion of the Court:)

This is an appeal from a judgment of the Supreme Court of the District on the return of a writ of certiorari quashing and vacating certain proceedings taken for assessing a drainage tax under the authority of the Act of May 19th, 1896, (29 Stat. 125), entitled "An Act to Provide for the Drainage of Lots in the District of Columbia."

The petitioner, appellee here, represents that she is a resident of Silver Spring, in the State of Maryland, and the owner in fee simple of sublot 26, in square No. 770, in the District of Columbia; that said lot is improved by a row of five dwelling houses; that the District by virtue of said Act has connected said premises with the water main and sewer on which said lot fronts and has assessed the charges therefor in the sum of $170.77, and has caused said assessment to be placed against said lot on the tax roll of said District as provided by said Act.

The petition further avers that said Act is unconstitutional and void because it discriminates between owners of real estate in said District and because it is not uniform and capable of universal enforcement. The petition also avers that assuming the validity of said Act it does not appear that petitioner was a non-resident at the time that the work was done for which said assessment was made, or "that the Commissioners of said District, either as a board or individually, gave the legal and official notice to the owner of said property as is required by said Act."

A rule to show cause why the writ prayed for should not issue was granted, and a return to the rule made. This return consisted of a formal answer, signed and sworn to by the three Commissioners of the District, to which was attached copies of such pertinent official papers and records as were in the custody of the District. If any

objection was made to this return the record fails to state it. The record does state, however, that a hearing was had "upon the petition, the rule to show cause issued thereon, and the answer of respondent thereto." As a result of this hearing the writ was ordered to issue. Thereupon the District adopted for its return to the writ the return to the rule to show cause, and the record fails to disclose that any objection was then made to either the form or the substance of the return. A hearing was had "on the writ of certiorari and the return thereto" which resulted in the quashing and setting aside of said tax or assessment.

The first question presented is, whether it is competent for this court to consider the sworn return of the Commissioners in determining whether the requisite notice was given petitioner. It will be observed that the petitioner does not allege in her petition that she did not have legal and sufficient notice. She merely alleges that "it does not appear" that she had such notice. The function of the writ of certiorari is to prevent and not to promote injustice. It is not a writ of right, but one to be issued in the discretion of the court and it is never issued except for the purpose of effecting substantial justice. District of Columbia *v.* Burgdorf, 6 App. D. C. 465. The writ lies to review and correct proceedings of tribunals exercising judicial or quasi-judicial powers, and that do not proceed according to the course of the common law. The records of such tribunals are frequently imperfect and lacking in completeness. The practice, therefore, obtains in many jurisdictions and has obtained in this jurisdiction of requiring a petition and answer thereto in the form of a return prior to granting the writ "to enable the court to deal with the substantial justice of the case untrammeled by merely formal and technical defects in the record." Bailey on Jurisdiction, Sec. 434a and cases cited. In many jurisdictions great liberality is allowed in this preliminary return or answer and in some jurisdictions even affidavits are then considered. In the case of Inhabitants of Tewksbury *v.* County Commissioners of Middlesex, 117 Mass. 563, which was a petition for a writ of certiorari to quash the proceedings of the County Commissioner in discontinuing a certain street, the court said:

"To enable the court to deal with the whole case upon the petition, it is necessary, and such is the established practice, for the commissioners or other inferior tribunal, to answer the petition, to return a copy of their record, except when it is annexed to the petition, and if the record does not state in detail all the facts proved and rulings made, necessary for the determination of the case, to make a return or certificate, stating fully such facts and rulings so far as necessary to raise the questions of law which the petitioners desire to have revised by this Court, and such return is conclusive as to all matters of fact within the jurisdiction of the inferior court, and cannot be impeached or controlled by the petitioners. As stated in Mendon *v.* County Commissioners, 5 Allen 13, the rights of all persons have a sufficient protection, in being intrusted to public officers, clothed with important public duties, who are under oath for their faithful performance, and who cannot be supposed to have any

interest or bias to misrepresent or suppress the actual facts as they took place before them."

The answer or return thus made is as much a part of the record as the official papers filed therewith, for said the Court in Worcester & Nashua Railroad Company *v.* Railroad Commissioners, 118 Mass. 561:

"The answer of the respondent, when it states any facts, is in the nature, not of an allegation of the party, but to an official return, conclusive in all matters of fact, and should be signed by the members of the tribunal, and not by an attorney."

The part of the return in the present case now objected to is as follows:

"Respondent says that diligent search was made by the officers and agents of the respondent to find the said petitioner within the District of Columbia, but she could not be found there after such diligent search. That the petitioner was informed and believed and still believes that the said petitioner was at the time of the performance of the acts complained of, and is now a citizen of the State of Maryland, and resides and did reside at Silver Hill, Maryland.

"Respondent further says that the Commissioners of the District of Columbia through their officers and agents did give legal and official notice to the said petitioner as required by the said Act of Congress. That notice was given by publication as required by the said Act and said notice was also sent to the said petitioner at Silver Hill, Maryland, postage prepaid by registered letter, on March 14, 1903, and was received by said petitioner on March 16, 1903, the registry return receipt with the signature of the petitioner, a copy of which is filed herewith as exhibit hereto and is prayed to be read as a part hereof, and the original thereof will be exhibited to the Court on the hearing of said rule."

Petitioner having discovered that the record of the proceedings leading up to the assessment was not full and complete in that it did not contain a recital of the *fact* that notice had been mailed her attempted to take advantage of that purely technical defect. It thereupon became the duty of the Commissioners in their return to the rule to state all the facts that the court might not be misled. Upon the granting of the writ had objection been made to the adoption by the Commissioners of their preliminary return the court undoubtedly would have permitted an amendment to the record for the purpose of supplying the defects now complained of by petitioner. Having then made no objection to the form of the return it is too late to do so now.

The sole object of this act is to provide for connecting certain improved premises in the District with public sewers and water mains. Legislation to effect such an object is a proper and legitimate exercise of police power. While courts will consider the purpose of an act they will not contravene certain established principles in giving it force and effect. The subject here dealt with is one easily controlled. No complicated machinery is necessary since there is but one thing to be done and that is the removal of a real or potential menace to the public health by resorting to the simple expedient of connecting offending premises with the public sewer

and water main. The premises controlled are within the jurisdiction where in the nature of things they are likely to remain. It would seem, therefore, that, no difficulty ought to be encountered in framing an act which in its practical operation would not only be unform but effectual. Does the present Act meet this very simple but very necessary requirement?

The first section of the Act is free from objection because it imposes a proper and uniform burden upon all improved lots in the District. The second section is also uniform in all its provisions. The third section prescribes the same punishment for all delinquents and, therefore, is not open to objection.

The discrimination found in the fourth section we deem fatal and clearly within the ruling of this Court in McGuire *v.* District of Columbia, 24 App. D. C., 22. That case involved the constitutionality of the Snow and Ice Law for the District, which authorized the Commissioners to remove snow and ice in front of unimproved or vacant lots at the expense of the owners thereof, but did not give the Commissioners authority to remove snow and ice in front of improved property. It did provide, however, that if the tenant or occupant of improved property failed to remove the snow and ice, within a given time, he should be liable to fine or imprisonment. The court said,

"It is to be noticed that, if the tenant or occupant of improved property fails to remove the snow and ice in front of his property, there is no provision in the Act for the performance of the work by the Commissioners of the District. Their duty of removal in this connection extends only to the sidewalks in front of unimproved or vacant lots. Here, again, is gross inequality as well as utter failure to subserve the purpose of the law,—for the intervention of the Commissioners is as necessary in the one case as in the other.

"In excuse of the inequality here apparent, it is alleged that the owners of vacant lots are often non residents, and, when such, cannot be reached by the process of fine and imprisonment. But this plainly is not sufficient excuse; for either the assessment authorized to be made for the failure to remove the ice and snow, and the performance of that duty by the Commissioners, is a charge under the power to assess property for benefits or it is an exercise of the police power of the State or municipality. The former will scarcely be contended, and, if it were contended, it would lack the necessary element of uniformity. The charge must be sustained, if at all, under the police power; but here, again, the element of uniformity is equally requisite, and is equally wanting in the enactment. We cannot have one law for the resident and another for the non resident owner of real estate in this District."

The same discrimination is found in section four of the present Act, for it provides that, if "the owner or owners of any such lot be a *nonresident* or *nonresidents* of the District of Columbia, or cannot be found therein," the Commissioners shall give certain notice and upon the failure of such owner to comply therewith may *"cause such connection to be made,"* and all the expenses thereunder, *"shall be assessed as a tax against such lot."* Thus, it will be seen that, the real object of the law is certain to be effectuated

only in the case of nonresidents or persons who cannot be found in the District. As to the much larger number of resident owners, the law does not authorize any action by the Commissioners, but merely provides that if such owners decline to comply with the Act they shall be fined. Counsel for the District contend that this provision of the statute will have the effect of coercing compliance with the Act and, therefore, balances the above provision in reference to nonresidents. When the object of the statute is taken into consideration we do not think such a contention can be sustained.

The assessment and collection of a fine whether the same be large or small is not the object of this law. Its sole object is to promote the public health. The resident owner may be fined, he may in default of payment be sent to jail, but the cause of complaint is not removed. His premises continue to offend and so far as this law is concerned may continue to do so indefinitely, notwithstanding the police court proceedings. It may happen that the person in whose name the legal title to a given lot stands is financially unable to comply with this law. If he lives in the District or can be found here his *premises* may not be molested but *he* may be fined. If he cannot be found here the object of the law is easily effectuated and the expenses connected therewith become a charge upon the lot. The title to a lot may be so defective that the owner may be unable to raise the money with which *the* comply with the law. If he lives here he must pay a fine or go to jail but the Commissioners must keep away from his premises. If he does not live here the Commissioners may proceed to promote the public health by connecting his premises as the law provides.

But it is needless to multiply reasons why we cannot sustain this assessment. No valid reason occurs to us why premises in the District similarly situated should not be similarly dealt with. No valid reason has been suggested why the Commissioners should not be clothed with exactly the same authority over the premises of residents as the Act gives them over the premises of nonresidents. The discrimination in the Act being clear and to our minds unreasonable and unjust we are constrained to sustain the judgment of the court below quashing the tax.

For the reasons above given the judgment is affirmed with costs, and it is so ordered.

Affirmed.

TUESDAY, *May 7th*, A. D. 1907.

No. 1770, April Term, 1907.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
ALICE BROOKE.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered

and adjudged by this Court that the judgment of the said Supreme Court in this cause, be, and the same is hereby, affirmed with costs.

Per Mr. Justice ROBB.

May 7, 1907.

Thursday, *May 23rd*, A. D. 1907.

No. 1770.

The District of Columbia, Appellant,
vs.
Alice Brooke.

On motion of Mr. E. H. Thomas, of counsel for the appellant, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue; and it is further ordered that the mandate be stayed pending proceedings on said writ of error.

United States of America, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between The District of Columbia, Appellant, and Alice Brooke, Appellee, a manifest error hath happened, to the great damage of the said Appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23rd day of May, in the year of our Lord one thousand nine hundred and Seven.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

____ ____.

UNITED STATES OF AMERICA, *ss:*

To Alice Brooke, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The District of Columbia is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard Chief Justice of the Court of Appeals of the District of Columbia, this 24th day of May, in the year of our Lord one thousand nine hundred and Seven.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 27th day of May, A. D. 1907.
JNO. RIDOUT.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 27, 1907. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 32 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The District of Columbia, Appellant, *vs.* Alice Brooke, No. 1770, April Term, 1907, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 27th day of May, A. D. 1907.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,776. District of Columbia Court of Appeals. Term No. 117. The District of Columbia, plaintiff in error, *vs.* Alice Brooke. Filed July 3, 1907. File No. 20,776.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 117.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

v.

ALICE BROOKE.

BRIEF FOR THE PLAINTIFF IN ERROR.

E. H. THOMAS,
F. H. STEPHENS,
Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 117.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

v.

ALICE BROOKE, DEFENDANT IN ERROR.

BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

This case comes up on a writ of error from the Court of Appeals of the District of Columbia, affirming a judgment of the Supreme Court of that District, which held to be unconstitutional the fourth section of the act of Congress of May 19, 1896, providing for the drainage of lots in the District of Columbia.

A petition was filed in the Supreme Court of that District for a writ of certiorari requesting the cancellation of certain assessments made against the property of the petitioner, defendant here, for work done thereon by the District of Columbia under the authority of the act referred to, commonly known as "the drainage act."

The petition recites that the defendant in error is a resident of Maryland and the owner of a row of five houses in

the southeast section of the city; that the Commissioners of the District undertook to connect the said premises with water main and sewer, under the authority of the said act, which act is unconstitutional and void because of discrimination between owners of real estate in the District; and that the assessments laid upon the said property because of the said work is invalid because of certain irregularities specified (Record, p. 3).

A rule to show cause why the writ of certiorari should not issue was obtained. A return to the rule was made, consisting of two parts—Part I, a formal answer under oath to the petition, and, Part II, copies of the official papers and records in the custody of the appellant pertaining to the said work and assessment. After argument, the writ was ordered to issue. Thereupon the appellant adopted in full as its return to the writ the return already filed to the rule to show cause, and argument was again had, judgment rendered quashing the assessment, and appeal in open court.

The Supreme Court of the District of Columbia decided three questions: 1st, that the formal answer of the Commissioners could not be considered a part of the return; 2d, that there was no notice to the appellee, as required by the act; 3d, that the act was unconstitutional because of the discrimination between property-owners.

Part I of the return shows that the defendant in error *could not be found in the District* after diligent search, and that she was at the time of the performance of the acts complained of a resident of Silver Hill, Maryland; that she was given the notice, as required by the act, which was sent her by registered mail to Silver Hill, Maryland, postage prepaid, and the registry return card with her signature thereon is exhibited; that thereafter the plaintiff caused plans and specifications to be prepared for the execution of the work of connecting the said premises with the sewer and water main, proposals for the said work were called for by advertisement, and the work let to the lowest bidder, and was duly per-

formed. The irregularities alleged in the petition are denied (Record, pp. 6-7).

Part II of the return (Record, pp. 8 to 13, inc.) contains the registry return receipt, a copy of the advertisement with the certificate of the secretary to the Commissioners that the notice was so advertised, order of the Commissioners to have the work performed, request of the Inspector of Plumbing that bids be advertised for, a copy of such advertisement, the bids received, the acceptance of the lowest bid, and a copy of the assessment of the cost of the work ($470.77) against the property.

For the convenience of the court, the act, which is a brief one, is reproduced *in extenso*, ~~in the Appendix~~.

> "AN ACT to Provide for the Drainage of Lots in the District of Columbia.
>
> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That each original lot or subdivisional lot situated on any street in the District of Columbia where there is a public sewer shall be connected with said sewer in such manner that any and all of the drainage of such lot, whether water or liquid refuse of any kind, except human urine and fecal matter, shall flow into said sewer; and if such original lot or subdivisional lot is situated on any street in said District where there is a public sewer and water main, such original lot or subdivisional lot shall be connected with said sewer and also with said water main in such manner that any and all of the drainage of such lot, whether water or liquid refuse of any kind shall flow into said sewer: *Provided*, That the connections required to be made by this act shall be made under the following conditions: When there is on any such original lot or subdivisional lot aforesaid any building used or intended to be used as a dwelling, or in which persons are employed or intended to be employed in any manufacture, trade, or business, or any stable, shed, pen, or

place where cows, horses, mules, or other animals are kept, then, and in that instance, such original lot or subdivisional lot shall be connected with a public sewer and water main or with a public sewer, as may be required with this act; and whenever, there is no such building, stable, shed, pen, or place, as aforesaid, on such original lot or subdivisional lot, then such lot shall be required to be connected with a public sewer only when it has been certified by the health officer of said District that such connection is necessary to public health.

"SEC. 2. That it shall be the duty of the Commissioners of said District to notify the owner or owners of every lot required by this act to be connected with a public sewer or water main, as the case may be, to so connect such lot, the work to be done in accordance with the regulations governing plumbing and house drainage in said District.

"SEC. 3. That if the owner or owners of any such lot neglect or refuse to make such connections as are required by this act within thirty days after the receipt of such notice, such owner or owners shall be deemed guilty of a misdemeanor, and shall, on conviction in the Police Court of said District, be punished by a fine of not less than one dollar nor more than five dollars for each day he, she, or they fail or neglect to make such connections.

"SEC. 4. That in case the owner or owners of any such lot be a non-resident or non-residents of the District of Columbia, or cannot be found therein, then, and in that case, the said Commissioners shall give notice, by publication twice a week for two weeks in some daily newspaper published in the city of Washington, to such owner, directing the connection of such lot with such public sewer or with such public sewer and water main, as the case may be: *Provided, however,* That if the residence or place of abode of the said non-resident lot owner be known or can be ascertained on reasonable inquiry, then, and in that case, a copy of the aforesaid notice shall be mailed to said non-resident, addressed to him in his proper name at his said place of

residence or abode, with legal postage prepaid; and in case such owner or owners shall fail or neglect to comply with the notice aforesaid within thirty days it shall be the duty of said Commissioners to cause such connection to be made, the expense to be paid out of the emergency fund; such expense, with necessary expense of advertisement, shall be assessed as a tax against such lot, which tax shall be carried on the regular tax roll of the District of Columbia, and shall be collected in the manner provided for the collection of other taxes.

"Approved, May 19, 1896" (29 Statutes, 125).

The Court of Appeals, in sustaining the judgment of the Supreme Court of the District, held that the return was a proper one, that the defendant had notice of the work about to be done, but that the act was unconstitutional.

Assignment of Errors.

1. The court below erred in giving judgment for the defendant in error, and in ordering the assessment against the property of the defendant in error to be quashed.

2. The court below erred in holding the said assessment to be illegal and void.

3. The court below erred in ordering the said assessment to be quashed.

4. The court below erred in holding section 4 of the said act to be unconstitutional and void.

ARGUMENT.

I.

The discrimination in this law is not between the resident and non-resident, but between those who can be found in the District and those who cannot be found in the District.

> "The legislation in question in the present case is that of the Congress of the United States, and must be considered in the light of the conclusion, so often announced by this court, that the United States possess complete jurisdiction, both of a political and municipal nature, over the District of Columbia."
>
> Parsons *v.* District of Columbia, 170 U. S., 53.

> "There is in this District no division of powers between the General and State governments. Congress has the entire control over the District for every purpose of government."
>
> Kendall *v.* The United States, 12 Peters, 619.

> "Congress may legislate within the District, respecting the people and property therein, as may the legislature of any State over any of its subordinate municipalities."
>
> Mattingly *v.* District of Columbia, 97 U. S., 687.

The Court of Appeals held that the authority of Congress to enact the statute in question was referable to the police power. The opinion says (Record, p. 23):

> "The sole object of this act is to provide for connecting certain improved premises in the District with public sewers and mater mains. Legislation to effect such an object is a proper and legitimate exercise of police power."

If the provision in section 4 of the statute for assessment "as a tax against such lot" in case the owner or owners of any such lot be a non-resident or non-residents of the District of Columbia, or cannot be found therein, be referable to the taxing power, then Congress had the right, by virtue of its control over this District under the Constitution, to exempt the property of residents from the tax.

> "In the exercise of this power, Congress like any State legislature unrestricted by constitutional provisions, may at its discretion, wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property."
>
> Gibbons *v.* District of Columbia, 116 U. S., 427.

The Court of Appeals construed said section 4 as imposing an unequal discrimination, without the element of uniformity requisite under the police power; that inequality was found by the court apparently in one part of the opinion to consist in a discrimination between residents and non-residents or persons who cannot be found in the District. The opinion says:

> "Thus, it will be seen that, the real object of the law is certain to be effectuated only in the case of non-residents or persons who cannot be found in the District. As to the much larger number of resident owners, the law does not authorize any action by the Commissioners, but merely provides that if such owners decline to comply with the act they shall be fined" (Record, bottom of page 24, and top of page 25).

The discrimination made in the statute is not between residents and non-residents. Section 4 of the statute, by its express terms, in the opening sentence distinguishes only between resident owners who can be found and resident or non-resident owners who cannot be found.

The test of the application of section 4 is whether the property owner can be found in the District, and that is the question presented in the record. Indeed, the opinion practically states this. It says:

> "If he lives in the District or can be found here, his *premises* may not be molested but he may be fined. If he cannot be found here the object of the law is easily effectuated and the expenses connected therewith become a charge upon the lot" (Record, p. 25).

The return of the plaintiff in error to the rule and writ of certiorari states:

> "Respondent says that diligent search was made by the officers and agents of respondent to find the said petitioner within the District of Columbia, but she could not be found there, after such diligent search. That the petitioner was informed and believed and still believes that the said petitioner was at the time of the performance of the acts complained of, and is now a citizen of the State of Maryland, and resides and did reside at Silver Hill, Maryland."

It thus appears, by the record, that the respondent could not be found in the District. If a resident owner "cannot be found therein" and the Commissioners comply with the conditions of said section 4, they may do the necessary work and assess and collect the tax precisely in the same manner as they proceed in the case of a non-resident owner.

On construing the act as an entirety, it will be observed that in substance section 1 provides that each improved lot situated on any street in the District of Columbia where there is a public sewer must be connected with it, and if there is also a water main such lot must be connected with that; and every unimproved lot must be so connected when necessary to public health. This is a duty imposed on every lot-owner.

By section 2 of the act, it is the duty of the Commissioners of said District to notify the owner or owners of every lot to so connect such lot.

By section 3 of the act, if the owner or owners of any such lot neglect or refuse to make such connection as required by the act within thirty days after the receipt of such notice, such owner or owners shall be deemed guilty of a misdemeanor and shall, on conviction, be fined.

The duty of the non-resident owner, the duty of the Commissioners with respect to such non-resident owner, and the liability of the non-resident owner to punishment is exactly the duty of the resident owner, of the Commissioners in respect to such resident owner, and the liability of such resident owner to punishment.

The penalty is sufficient to coerce any resident or non-resident owner found in the District to make the necessary connection of the lot with the public sewer or water main, because for every day of failure or neglect such owner, by the intent and language of said section 3, must be punished.

It is true, as the Court of Appeals says in its opinion (Record, p. 25):

> "The assessment and collection of a fine, whether the same be large or small, is not the object of this law. Its sole object is to promote the public health."

But if the inference is to be drawn from the opinion that the resident owner only may be fined or sent to jail in default of its payment, such inference is incorrect and is contradicted by the following statement in the opinion:

> "If he lives in the District or can be found here, his *premises* may not be molested, but *he* may be fined. If he cannot be found here, the object of the law is easily effectuated, and the expenses connected therewith become a charge upon the lot."

The circumstances that the resident (or non-resident) owner may be confined in jail or be financially unable to comply with the law or may have a defective title may show possible hardships in enforcing the law, but they do not

show, it is respectfully submitted, any legal reason for holding that there is an unlawful discrimination in it.

> "The fact that the mode prescribed for the non-resident may be more inconvenient than that prescribed for the resident is not because the statute intends to make a discrimination, but because of the situation of the parties, and because, in the judgment of the law-making power, no other as effective way could be adopted for the protection of the public."
>
> McFadden *v.* Blocker, 58 L. R. A., 898.

If any distinction has been made by the Court of Appeals between residents and non-residents, such distinction does not exist under this statute because it treats absent residents and non-residents alike. There is no discrimination against the non-resident owner solely because he is a non-resident.

Even where personal liberty was involved a similar statute was held constitutional.

> Frost *v.* Brisbin, 19 Wend., 11. (This case has been cited and followed by the Court of Appeals in Howard *v.* The Citizens' Bank and Trust Co., 12 App. D. C., 222, 235, and Robinson *v.* Morrison, 2 App. D. C., 105, 128.)

Indeed, said section 4 is but an example of a class of legislation which has given for a long period in this District right of seizure of or liens on the property of non-resident owners or persons who cannot be found therein.

By act of Maryland of 1773, chapter 7, section 3, it was enacted that in any suit in chancery if any defendant against whom any process shall issue does not appear an affidavit could be made showing "to the satisfaction of the court that such defendant or defendants is or are out of this province, or that upon inquiry at his, her, or their usual place of abode, he, she, or they *could not be found* so as to be served with process," etc., process or publication could be had, and after

certain formalities the bill could be taken *pro confesso* and the decree enforced by sequestration of the real and personal estate and effects of the party or parties.

Abert's Compiled Statutes, 76, sec. 9.
1 Dorsey, Laws of Md., pp. 123, 124.

The act of Maryland of 1785, chapter 72, section 30, provided a remedy by actual service or by publication against any mortgagor or person claiming under him residing out of the State (Abert's Compiled Statutes, 491; 1 Dorsey's Laws Md., 225).

The Maryland act of 1787, chapter 30, section 2, provided "if in any suit in chancery against any defendant or defendants who resides out of this State to compel a conveyance of land, or real or personal property, in this State, on affidavit being made to the satisfaction of the court, that such defendant or defendants *is or are out of the State*, and that personal notice has been served on the defendant or defendants, or that notice of filing such bill hath been given ten weeks in the public newspapers," etc., a decree *pro confesso* may be taken and a decree may be made thereon which on certain conditions will stand confirmed.

Abert's Compiled Statutes, p. 93.

Section 768 of the Revised Statutes of the United States, relating to the District of Columbia, provided:

> "The Supreme Court has power to proceed in all common law and chancery causes instituted before it, in which either of the parties reside without the District, in the same way that non-residents were proceeded against in the general court or in the Supreme Court of Chancery in the State of Maryland on the third day of May, eighteen hundred and two."

Sections 787 and 788 of the Revised Statutes of the District of Columbia provided:

> "Publication may be substituted for personal service of process upon any defendant who cannot be

found, in suits for partition, divorce, by attachment, for the foreclosure of mortgages and deeds of trust, and for the enforcement of mechanics' liens and all other liens against real or personal property, and in all actions at law or in equity which have for their immediate object the enforcement or establishment of any lawful right, claim or demand to or against any real or personal property within the jurisdiction of the court." (Referred to in Simmons *v.* Fry, 19 D. C., 472; Plumb *v.* Bateman, 2 App. D. C., 156.)

"SEC. 788. No order for the substitution of publication for personal service shall be made till a summons for the defendant shall have been issued and returned 'not to be found.'"

Sections 105 and 106 of the Code of the District of Columbia provide:

"SEC. 105. Publication may be substituted for personal service of process upon any defendant who cannot be found and who is shown by affidavit to be a non-resident, or to have been absent from the District for at least six months, or against the unknown heirs or devisees of deceased persons, in suits for partition, divorce, by attachment, foreclosure of mortgages and deeds of trust, the establishment of title to real estate by possession, the enforcement of mechanics' liens, and all other liens against real or personal property within the District, and in all actions at law and in equity which have for their immediate object the enforcement or establishment of any lawful right, claim or demand, to or against any real or personal property within the jurisdiction of the court.

"SEC. 106. No order for the substitution of publication for personal service shall be made until a summons for the defendant shall have been issued and returned 'not to be found,' and the non-residence of the defendant or his absence for at least six months shall be proved by affidavit to the satisfaction of the court." (Construed in Jones *v.* Rutherford, 26 App. D. C., 114, 118.)

In principle, it is submitted, the discrimination, if there is any discrimination, between non-residents or persons who cannot be found and residents is the same in the Maryland Statutes, the Revised Statutes, and the Code as the so-called discrimination in section 4 of the act approved May 19, 1896 (29 Statutes, 125), now under consideration.

No court has doubted the constitutionality of above statutes here compared with the last-named act.

II.

If it be thought that the discrimination is between residents and non-residents, nevertheless the discrimination is a reasonable one.

It is a matter of common knowledge in the legal profession that statutes exist in nearly every State of this country permitting an attachment against the property of non-residents, real and personal, in actions *ex contractu*, before any adjudication of the debt is had, where none is permitted against the resident.

Also, laws discriminating against non-residents in other matters are not uncommon and the courts are constantly enforcing them.

Assuming that a clear distinction is made in the statute in favor of residents and against non-residents, and that the statute is subject to every criticism made in the opinion of the Court of Appeals, we respectfully maintain that the discrimination in the act is neither unreasonable nor unjust.

The only authority cited by the Court of Appeals in its opinion (Record, p. 24) is Mc e *v.* District of Columbia, 24 App. D. C., 22. The statute construed in that case did not refer on its face to any distinction between residents and non-residents. It does not appear that McGuire, the appellant, was in fact a non-resident, or what relation he bore to the property, or whether he was in a situation to complain

of the inequalities of the law then under consideration; and no authority is cited in favor of the position of the court in that opinion. It is respectfully submitted that the McGuire case is not authority for the position taken by the Court of Appeals in this case.

It was insisted in Central Loan and Trust Co. *v.* Campbell Commission Co. that a territorial statute authorizing the issue of an attachment against the property of a non-resident defendant without condition precedent that a bond be filed, while in like proceedings against a resident no bond was required, was in conflict with the Fourteenth Amendment to the Constitution of the United States because in such case non-residents are not capable of separate identification from residents by any fact or circumstance other than they are non-residents. This court sustained the law. In the opinion it was said:

> "But the difference between exacting a bond in the one case, and not in the other, is nothing like as great as that which arises from allowing process of attachment against a non-resident and not permitting such process against a resident in any case. That the distinction between a resident and a non-resident is so broad as to authorize a classification, in accordance with the suggestion just made, is conceded, and, if it were not, is obvious."
>
> Central Loan & Trust Co. *v.* Campbell Commission Co., 173 U. S., 84.

On the same ground the Supreme Court of Ohio held that no unconstitutional discrimination between resident owners of land along the line of a ditch is made by a statute permitting any resident owner, when the ditch needs cleaning, to petition therefor under a section simply requiring a sworn statement of such necessity to be made to the county auditor, while non-resident owners can only petition for such improvement under a section which requires application to be

made to the county commissioners, and the giving of a bond for the payment of costs, if the application is not granted.

Taylor *v.* Crawford, 72 Ohio St., 560.

A statute imposing heavier penalties upon non-residents for violation of game laws does not deny them the equal protection of the laws. Allen *v.* Wyckoff, 48 N. J. L., 90.

After the cession of Maryland, but before the first Monday in December, 1800, the time when the seat of government was to be removed to the District of Columbia, land in this District belonging to Robert Morris was attached, and it was held:

> "A law subjecting the property of a citizen of another State, situate in this State, to attachment here by a process different from that used in the attachment of the property of a citizen of this State, is not in contravention of the clause of the Constitution of the United States declaring that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."
>
> Campbell *v.* Morris, 3 H. & McH., 535.

Chemung Canal Bank *v.* Lowery, 93 U. S., 72:

> "A statute of Wisconsin providing that the statute of limitations shall not run against a defendant who is out of the State if he resides within the State, but shall, if he resides out of the State, is not repugnant to article IV (equal privileges and immunities).

Field *v.* Barber Asphalt Co., 194 U. S., 618, 621-622:

> "The exact point of objection is that the improvement is not to be made if a majority of the resident owners of the property liable to taxation therefor shall file with the city clerk a protest against such improvement, which privilege of protest is not given to non-resident owners, thereby discriminating against them. It is well settled, however, that not every discrimination of this character violates con-

stitutional rights. It is not the purpose of the Fourteenth Amendment, as has been frequently held, to prevent the States from classifying the subject of legislation, and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed. (Citing cases.) The alleged discrimination is certainly not an arbitrary one; the presence within the city of the resident property owners, their direct interest in the subject-matter, and their ability to protest promptly if the means employed are objectionable, place them on a distinct footing from the non-resident, whom it may be difficult to reach."

In Savannah, etc., Ry. *v.* Savannah, 198 U. S., 392, the court held valid an ordinance of the city of Savannah taxing street railroads within the city, while not taxing a steam railroad which had branch tracks in the city and charged extra for local deliveries of freight, most of the business of the steam road being done out of the city.

Hawley *v.* Hurd, 72 Vt., 122:

> "A statute which exempts from attachment negotiable paper held by a bank within the State does not work a discrimination against banks without the State, under article IV, section 2, Federal Constitution."

McFadden *v.* Blocker, 54 S. W., 872:

> "A statute of Arkansas, by Congress extended to Indian Territory, which provides that mortgages of chattel mortgages executed by non-residents shall take possession in order to secure a lien against third parties, while those executed by residents need only be recorded where the mortgagor resides, does not infringe article IV, section 2."

Tatem *v.* Wright, 23 N. J. L., 429:

"Tax upon agents of non-resident corporations held to be valid. No such tax on agents of resident corporations."

Id., Ins. Co. *v.* Com., 5 Bush., 68 (79).
Id., Ins. Co. *v.* N. O., 1 Woods, 85.

Conn. *v.* Ins. Co., 73 Conn., 255:

"Different method of taxing resident and non-resident stockholders whereby the latter were compelled to pay a higher rate. Held constitutional."

Cribbs *v.* Benedict, 64 Ark., 555:

"Assessments for digging ditches to be collected against a resident by proceedings in the Circuit Court, and against a non-resident by a tax on the land—not an infringement of article IV, section 2, U. S. Constitution" (563)

"Residents of Territories and Reservations.—These prohibitions do not prevent Congress from giving residents of unorganized Territories and Indian reservations privileges and immunities not accorded non-residents therein."

8 Cyc., 1038.

"This does not, however, prevent a State from taxing all companies doing a certain kind of business; from placing on foreign corporations a different tax from that placed on similar domestic corporations; from placing a different tax on corporate stock owned by a non-resident than the tax on such stock owned by a resident."

8 Cyc., 1047.

"The State may provide a special method of valuation of lands belonging to non-residents; * * * so, too, it may provide the manner of charging the assessment and for notice to residents only in assessing omitted property."

8 Cyc., 1048.

8 Cyc., 1073:

> "The Fourteenth Amendment was intended to secure equality of rights to all people; and this includes equal exemption with others of the same class from all charges and burdens of every kind, although a law *may discriminate* in favor of a certain class, and if *founded upon a reasonable* distinction in principle, it does not deny the equal protection of the laws."

The equal protection of the laws "is not impaired by a State statute requiring every non-resident owner to file, under penalty of a fine for non-compliance, a list more particularly descriptive of his realty than is required of the resident tax-payer" (1 Cooley, 3d ed., p. 80; Commonwealth *v.* Holiday, 98 Ky., 616).

Allen *v.* Wyckoff, 18 N. J. L., 90:

> "An act imposing greater restrictions and severer penalties for the protection of fish and game upon non-residents than upon residents does not violate the Fourteenth Amendment of the Federal Constitution."

III.

There is no unlawful discrimination in the remedy which may be used to enforce the doing of the work prescribed by the act. All owners may be required to do such work.

(*a.*)

The reasoning of the Court of Appeals (Record, p. 25) is that the act is unconstitutional because the remedy, by fine, against the resident, is not adequate, following the argument of the court in the McGuire case (24 App. D. C., pp. 30-31). It is difficult to perceive how the effectiveness or inadequacy of a remedy affects the validity. A remedy by fine, or by

imprisonment in default of payment of the fine, may fall far short of achieving the purpose of a law, but this is a matter for legislative discretion, and is the manner in which the laws are usually enforced. It does not affect in the least the legality of the enactment. But the remedy against the non-resident, or person who cannot be found, is admittedly effective, and the case at bar is such a case. There is no question here concerning a resident or person who can be found in the District. The matter of constitutionality as to residents who can be found, would seem, therefore, not to be involved. At least the Court of Appeals decided in D. C. *v.* Green, 29 App. D. C., 295, where a resident was prosecuted for the violation of the Act of March 1, 1899, relating to weeds, a very similar piece of legislation, that the constitutional question of unjust discrimination was not before the court.

Schmidt *v.* City of Indianapolis, 168 Ind., 631.

The provision that the Commissioners may charge the cost of connecting the sewer and water main against the property of non-residents or persons who cannot be found in this District is simply a remedy and not a discrimination.

All property must be so connected by whomsoever owned under the terms of section 1 of the act approved May 19, 1896; all owners must be notified to do so under the provisions of section 2, and by section 3 all owners are deemed guilty of a misdemeanor on neglect or refusal to comply with such notice. Resident owners who can be found in the District may be required to comply with the statute by an effective remedy, hence the difference is merely in the kind of remedy.

The statement of the discrimination made in the opinion of the Court of Appeals (Record, p. 25) "As to the much larger number of resident owners, the law does not authorize any action by the Commissioners, but merely provides that if such owners decline to comply with the act, they shall be fined," we respectfully submit, is erroneous.

That the non-resident owner who cannot be found cannot be fined is of no importance.

The statute is effective and may be enforced against all persons by civil process, notwithstanding its penal provisions.

The fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate the nuisance.

Carllton *v.* Rugg (Mass.), 5 L. R. A., 193.

> "There are many cases," * * * "where the remedy by injunction would be much more efficacious than by enforcing the penalties of an ordinance; and where the nuisance is one affecting only or principally the inhabitants of the municipality, and its abatement is among the powers granted or duties imposed upon it, there would seem to be no good reason why the action to abate might not be brought in the name of the municipality, as well as in the name of the State itself by the Attorney-General."
>
> Village of Pine City *v.* Munch (Minn.), 6 L. R. A., 763.

The duty to make said connections having been imposed on all owners and the duty of requiring all owners to do the work having been cast on the Commissioners by the statute, why cannot the obligations of the statute be enforced by mandatory injunction?

A bill in equity is maintainable by the Commissioners of this District in their own names as Commissioners for a mandatory injunction to compel a person, whose license to temporarily occupy a portion of a public avenue and parking has been revoked, to remove a structure used as a refreshment stand from such avenue and parking.

McBride *v.* Ross, 13 App. D. C., 576.

To remove a show-window.

Guerin *v.* Macfarland, 27 App. D. C., 478.

"As there is, in such cases, a judicial remedy in favor of the citizen, so on principle the right of the corporate authorities to resort at their election to the courts in proper cases to aid them when the citizen is in the wrong, should, in the author's judgment, be also recognized."

1 Dillon Mun. Corp. (3rd ed.), sec. 379, page 384.

Watertown *v.* Cowan, 4 Paige Ch., 510.

Village of Pine City *v.* Munch (Minn.), 6 L. R. A., 763.

(b.)

Even in the exercise of the taxing power, which the courts construe more strictly, a wide latitude is observed, and upheld by the courts.

Pacific Express Co. *v.* Seibert, 142 U. S., 339; p. 351:

"This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its condition or class, will be destructive of the principle of uniformity and equality in taxation and of the just adaptation of property to its burden."

Charleston, etc., R. R. *v.* Gibbs, 142 U. S., 386:

"The property of railroads in South Carolina is subjected by the general law to the same tax as similar property of individuals, in proportion to its value, and like conditions of uniformity and equality in its assessment are imposed. A further tax laid upon them to meet the expenses and salaries of the railroad commissioners is not in proportion to the

> value of the property, but according to the gross income proportioned to the number of miles of their roads in the State."

It was objected that the tax to pay for the services of the railroad commissioners was illegal and not uniform.

> "The railroad commissioners are charged with a variety of duties in connection with the railroad, the performance of which is of great importance in the regulation of those instruments of transportation."

Held, that the tax was valid.

Columbia Southern R. R. *v.* Wright, 151 U. S., 470 (478):

> "The transitory or unlocated personal property of the railroad was distributed among the counties of the State for taxation and taxed by the counties at different rates. It was objected that this method was unjust discrimination, but the court held that it was not."

Merchants' Bank *v.* Pennsylvania, 167 U. S., 461:

> "A statute permitting banks to pay eight mills on the dollar of its capital stock at par if it is paid before the first of March; and if not, to pay four mills on the actual value, does not infringe the Constitution of the United States."

BREWER, *J.* (p. 463):

> "If a bank has a large surplus, and its stock in consequence, worth five or six times its par value, naturally it elects to collect and pay the eight mills, and thus in fact it pays at a less rate on the actual value of its property than the bank without a surplus, and whose stock is only at par. So it is possible, under the operation of this law, that one bank may pay at a less rate upon the actual value of its banking property than another; but the banks which do not make this election, whether state or national, pay more than the regular tax. The result of the election under the circumstances is simply that those electing pay less.

But this lack of uniformity in the result furnishes no ground of complaint under the Federal Constitution. * * *

"Again, it will be perceived this inequality in the burden results from a privilege *offered to all*, and in order to induce prompt payment of taxes and payment without litigation."

Magoun *v.* Bank, 170 U. S., 283:

"Sustaining an inheritance tax law of Illinois which taxed strangers to the estate more than relatives, and relatives unequally."

In L'Hote *v.* New Orleans, 177 U. S., 587, an ordinance of New Orleans, prohibiting any lewd or abandoned woman from occupying, inhabiting, living, or sleeping in any room, outside of certain defined limits, was upheld as a valid exercise of the police power.

In Petit *v.* Minnesota, 177 U. S., 164, a statute of Minnesota was upheld which forbade labor on Sunday except works of necessity and charity, and declared that hair cutting and shaving on Sundays were not such, as applied to barber shops kept open for that purpose.

American Sugar Refining Co. *v.* Louisiana, 179 U. S., 89:

"*Syllabus.*—A State imposing a license tax upon persons and corporations carrying on the business of refining sugar and molasses does not, by exempting from such tax 'planters and farmers grinding and refining their own sugar and molasses,' deny sugar refiners the equal protection of the laws within the Fourteenth Amendment."

In Austin *v.* Tennessee, 179 U. S., 343, the Supreme Court declared that it would not take judicial notice of the fact that tobacco was more noxious in the form of cigarettes than in any other; but the court held valid a statute of the State of Tennessee prohibiting "any person, firm, or corpo-

ration to sell, offer to sell, or bring into the State for the purpose of selling, giving away, or otherwise disposing of any cigarettes, cigarette paper, or substitute for the same."

In St. John *v.* New York, 201 U. S., 633, the court held valid, as an exercise of the police power, a statute of the State of New York prohibiting the sale of adulterated milk, in which non-producers of milk selling that article were held to an absolute standard and punished for selling milk below the standard fixed; but producers of milk, or those selling milk from their own herds, were not held if the milk was of the same quality as it came from the herd.

Taggart *v.* Claypole, 32 L. R. A., 586:

> "Giving to residents of a territory taken in by a municipality, in annexation proceedings, the right to appeal, does not deny to non-residents equal privileges and immunities."

McFadden *v.* Blocker, 58 L. R. A., 894:

> "Non-residents of unorganized territories are not given the same rights as residents by the provisions of the Federal Constitution, providing that the citizens of each shall be entitled to all privileges and immunities," &c.

IV.

The owner cannot remain silent while work is being done, of which he has notice, and then, after it is completed and his property benefited, be heard to complain that the proceedings are illegal.

> "It is a general rule, now fully accepted in this State, that where the owner of property subject to assessment for public improvements, stands by and makes no objection to such improvements, which benefit his property, he may not deny the authority by which the improvements are made, or defeat the

assessments made against his property for the benefits derived; and that this is true both where the proceedings for the improvement are attacked for irregularity, and where their validity is denied, but color of law exists for the proceedings."

Com'rs *v.* Plotner, 149 Ind., 116, 119, cited in 2 Cooley (3d ed.), p. 1515, with many other cases from Indiana, Iowa, Kentucky, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New York, Oregon, and Pennsylvania. Approved in Wight *v.* Davidson, 181 U. S., 371-377.

Kellogg *v.* State, 15 Ohio St., 64:

"Where county commissioners acting ostensibly under the provisions of the act of March 24, 1899, 'to provide for locating, establishing and constructing ditches, drains and water courses,' have established and constructed a ditch and to pay for the same have levied an assessment on the lands of persons benefited thereby: *Held*, that where a party on whose lands such ditch has been wholly or in part constructed, has stood by and failed to resort to any remedy legal or equitable until after the ditch was made, a court of equity will not interfere by injunction to prevent the collection of such assessment, even if it be assumed that the proceedings of the commissioners have so far failed to conform to the provisions of said statute as to render them wholly illegal and void in law" (Syl.).

Vickery *v.* Board, 134 Ind., 554:

"Proceedings attacked on the ground that the law under which they were had was unconstitutional. The court held, that one who receives a benefit under an unconstitutional law cannot deny the constitutionality of such law."

McCoy *v.* Able, 131 Ind., 417:

"Principle and authority forbid that property-owners should be allowed to stand by inactive and passive until after the work has been done and then

> come in and attack either the contractor or the value of the work and materials without compensation."

Ross *v.* Stockhouse, 114 Ind., 200:

> "One who acquiesces with knowledge cannot escape payment for the actual benefits received, even though the proceedings turned out to be void; he cannot enjoy the benefits and escape the burden unless he interfere or give notice before the benefit is received."

Where an owner has knowledge of work being done by a municipality, he is put on inquiry as to the right of the corporation, and if he remain silent and fail to assert his remedy until after the improvement has been made and paid for by the municipality, he cannot resist the tax assessment on the ground of illegality of the proceedings, even where he did not know of such illegality.

State *v.* Mayor, 36 N. J. L., 162.
State *v.* Mayor, 40 N. J. L., 246.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

MAR 12 1909
JAMES H. McKENNEY,

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 117.

DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

ALICE BROOKE, DEFENDANT IN ERROR.

BRIEF FOR APPELLEE.

JOHN RIDOUT,
GEORGE C. GERTMAN,
Attorneys for Defendant in Error.

THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

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The Case.

This is a proceeding filed by defendant in error (petitioner) against the District of Columbia, plaintiff in error. The facts appear in the record. Upon presentation of the petition in the trial court the justice directed that a rule be issued to respondent (plaintiff in error) to show cause why the writ of certiorari prayed for in said petition should not issue. Whereupon the plaintiff in error filed an answer, designated "Part 1," and also a return consisting of copies of all its proceedings in relation to the matter in controversy, which return is designated "Part 2" (Rec., pp. 6, 7, and 8).

After hearing arguments of counsel on both sides the trial court directed the writ of certiorari to issue which was accordingly done. To this writ the plaintiff in error (Rec., p. 15) adopted as its return thereto the return to the rule to show cause referred to.

Subsequently the cause came on for hearing and after

a full and complete consideration of the petition and record, and arguments of counsel, the trial court (Rec., pp. 15 and 16) adjudged the assessment to be illegal and void, and quashed said assessment and directed the cancellation of the same on the tax records of plaintiff in error. From this judgment the plaintiff in error appealed to the Court of Appeals where the judgment of the trial court was affirmed and the case is now here on writ of error.

Certiorari is the Appropriate Remedy to Test the Validity of a Tax.

Weed *vs.* Boston, 42 L. R. A., 642.
Wood *vs.* D. C., 6 Mackey, 154.
District of Columbia *vs.* Burgdorf, 6 Appeals D. C., 465.
Mattingly *vs.* D. C., 28 Appeals D. C., 176.
Brandenburg *vs.* D. C., 26 D. C. Appeals, 140; 205 U. S., p. 135.
Gerdes *vs.* Champion, 108 Ills., 137.

The Record is Fatally Defective.

Counsel for defendant in error not having yet received a copy of plaintiff in error's brief, will confine themselves to pointing out to the court briefly:

First, the defects in the record in respect to want of notice to defendant in error of the proposed work for which the assessment was levied, assuming for the sake of argument that the act hereinafter referred to is valid, which is denied; and,

Secondly, the question of the unconstitutionality of the said act of Congress under which the alleged work was done and assessment complained of made.

By act of Congress of May 19, 1896 (29 Stat. at L. 125, chap. 206), Congress attempted to provide a system of compulsory water main and sewer connections.

The act requires notice to be given. Section 4 expressly provides that notice shall be mailed to the nonresident owner if her residence be known. There is no claim here that defendant in error was not a nonresident nor that her address was not known.

The record designated "Return No. 2" discloses that defendant in error's charge is true in this respect. Nowhere in the record does it appear that notice was mailed to defendant in error in conformity with the statute. It does show that a parcel (not a letter) was once mailed, but no *record* shows the contents of that parcel or its application, if any, to the matter in controversy. Had that notice, which the statute requires, been given, it would have been easy to have preserved some record thereof. On the contrary, the record negatives the idea that copy of the notice was mailed to the defendant in error, for the alleged order of the Commissioners (Rec., p. 10), directing that the property be connected, states that the defendant was notified by publication—not by sending copy of the publication to her as by the statute required. It is, therefore, apparent that the failure to mail, post-paid, to the defendant in error a copy of the publication or notice, was an oversight.

The sending of notice, postage prepaid being one of the most important of the essentials of this mandatory statute, any omission by the plaintiff in error in compliance therewith invalidates the whole proceeding.

The *record* fails to disclose that any nuisance existed on defendant in error's property, or that the means of drainage already there was insanitary, insufficient, or inadequate, nor any necessity for making the connection.

Property rights are sacred, and when a person undertakes to exercise dominion over that which is not his he assumes the consequences of his unlawful act as in this case, when the plaintiff in error according to the record, undertook to deal with the property of the defendant in

error without first affording her an opportunity to be heard, the plaintiff in error must abide the result of its unlawful act.

The plaintiff in error appreciating the serious shortcomings of its return in this regard endeavored to cure the serious defects by filing its answer (Rec., pp. 6 and 7), designated "Part 1, Answer to Rule," but this answer, which is on information and belief, can not be considered by the court as a part of the return to the writ of certiorari. Counsel stipulated that the "Return No. 2" of copies of records might be considered by the court in the place and stead of the originals; this negatives any contention which may be made by plaintiff in error that its answer might be considered as part of the return.

In many cases similar to this it has been held that the record, as returned pursuant to the writ of certiorari, should affirmatively show that each step required of the Commissioners of the District of Columbia, or other officers, by the statute, had been strictly and faithfully complied with in every detail, else the assessment or tax is void.

Burgdorf *vs.* D. of C., 6 Appeals, D. C., 470 et seq., the court said:

> "After the writ has been granted and the record certified in obedience to it the questions arising upon *that record* must be determined according to the fixed rules of law."

The court also said:

> "In this case, on the record returned in response to the writ of certiorari, it does not appear that any part of this requirement of the statute has been complied with. It is expressly admitted that there is no record showing any assessment or notice thereof, given. . . . Without this proceeding no liability could arise, and no proceeding could be taken against the property or its

owner. It is essential, therefore, that the *record* should contain strict compliance with the statute in this respect."

Keyser *vs.* D. of C., 3 Appeals, D. C., 31.
Allman *vs.* D. of C., 3 Appeals, D. C., 8.
Johnson *vs.* D. of C., 6 Mackey, page 21.

In Lyon *vs.* Alley, 130 U. S., page 177, which was a tax assessment case from this District, this Court said:

"In the District of Columbia, where a special improvement tax has been imposed, the failure of the commissioner of improvements to deposit with the registrar a statement of the taxes, the failure of the registrar to place without delay in the hands of the collector a list of the persons taxed, and the failure of the collector to give the required notice to such persons constitute such a nonobservance of the requirement of the statute as to render invalid the tax sale and certificates thereof."

Volume 25 Am. & Eng. Encp. of Law (2d ed.), page 1204, the doctrine is laid down thus:

"The effect of the levy of special assessments being to charge the property of the citizen with a burden for the public benefit, it is a well recognized general rule that the provisions of the law must be strictly pursued. The successive steps of the statute are intended for the protection of the property owner and are his safeguards against the exercise of arbitrary power; each act is essential to the exercise of the jurisdiction and each act must be rigidly performed."

And at page 1211 of same work the author says:

"In cases of improvements by municipalities, the statutes generally require some action on the part of the municipality by ordinance or resolution as to the foundation of the proceedings. Such action is indispensable to the validity of the assessments, etc."

The only object of the common law writ of certiorari is to enable the Appellate Court to ascertain *from the record*, first, whether the inferior tribunal had jurisdiction of the subject-matter; and, second, if it had jurisdiction, whether it proceeded according to law. This can be only ascertained from what the record shows, and not by what the respondent might, years thereafter, on information and belief, wish to say about the matter.

Vol. 4, Cycl. Plead. & Prac., page 12:

> "The office of the writ of certiorari is confined to bringing up the record alone, and any matters dehors the record which are returned therewith should be disregarded by the court." Citing many cases in many States.

Same, page 277:

> "The hearing in the absence of statutory authority to the contrary is on the record as returned, and the reviewing court confines itself to an inspection of such record."

Same, page 287:

> "Matters outside of the record will not be considered by the court; the irregularities complained of must appear on the record."

Same, at page 290:

> "All natural and proper conclusions from the record will be indulged, but where the performance of necessary particulars which ought to appear of record is not shown, it will be presumed that the proceedings were irregular in that respect."

Same, at page 11:

> "When issued and served, it becomes the duty of the inferior court or body to whom it is directed to transmit a full and complete transcript of the records and proceedings for which com-

> plaint is made properly certified to the court awarding the writ. It is not the duty of the jurisdiction to which it is directed to certify or return facts dehors the record, but simply the record itself."

Same, at page 282:

> "It is not permissible for the purpose either of determining the merits of the controversy or proceeding, or of showing what transpired before the inferior tribunal to hear oral evidence, or to read affidavits or hear depositions, as they form no part of the record."

Vol. 6, Cycl. Law & Procedure, page 804; 9 Century Digest, sec. 145, page 1891:

> "Where the rules of the common law are adhered to, the writ brings up, and the return can only properly include the record, or proceedings and orders in the nature of a record upon which the determination which is the subject of review was made." Citing many cases in many States.

Vol 6, Cyc. Law Procedure, page 822:

> "Except where otherwise prescribed by statute or authorized by practice, it is the general rule in ascertaining whether or not the inferior court or tribunal had jurisdiction, and proceeded regularly in making the determination complained of, the reviewing court is confined to the consideration of the record returned in obedience to the writ, by which the error, if any, must appear."

The Act is Unconstitutional and Void.

Defendant in error, however, not waiving the foregoing contentions insists that said act of Congress is unconstitutional and void.

This contention is based upon certain salient vices in

the act which are apparent upon its face, of which the principal are:

(*a*) The attempt to give controlling evidential effect to the mere existence of an improvement in case of improved property, and to the ex parte certificate of the Health Officer in the case of unimproved property, thus violating the "due process" clause of the Constitution.

(*b*) Because the act lacks the requisite uniformity inasmuch as it undertakes to provide one law for property of resident and another for property of nonresident owners in said District.

(*c*) Because the act is not capable of universal enforcement, and creates unequal burdens.

(*d*) Because the act is incapable of uniform enforcement as against all property in the District of Columbia.

Perusal of the act will clearly disclose the absolute lack of uniformity which is essential to the validity of such an act even though it be considered that it embodies a lawful exercise of the so-called police power, under the guise of which so many attacks have been made upon the due process and uniformity clauses in the Constitution.

The invalidity of such an act has been shown in the opinion in McGuire *vs.* District of Columbia, 24 Appeals D. C., 22. That case involved the validity of the snow and ice law which the court declared to be most beneficial in its purpose and which the court expressed its desire to sustain, yet it found itself unable to do so, and by unanswerable reasoning determined upon the grounds stated in the opinion that the act was unconstitutional.

See, also, Heylman *vs.* D. C., 27 Appeals D. C., 563.

The act involved in this case is far more vicious in form.

The question in this case is whether this act though falling within the legislative power of Congress is so

framed as that it imposes unequal burdens upon property owners in the District of Columbia and whether its provisions are or not of general or universal application to all persons and property similarly situated.

It will be observed that while the duty to make the connection is the same as to the owners of all lots, the result of the omission to perform such duty in the case of a resident lot owner or owners found within the District is to subject such person to a criminal proceeding while in the case of owners not found within the District who fail to connect the result is to subject the person to a civil and not a criminal proceeding, and the specific duty is cast upon the Commissioners to make such connection and then to assess the cost against the property and collect it as a tax.

In this situation of the provisions of law, the owner of every lot in the District who is a nonresident or not found within the District of Columbia is powerless to defeat the purpose of the law, namely, to have the connection made, because if he fails to do it himself, the Commissioners are required to do it, nor can he escape the cost, because if he fails to pay it, it is assessed against his property and collected as other taxes. In the case of a resident lot owner or a nonresident found within the District, however, *the purpose of the law*, namely, the making property sanitary, may be defeated altogether by the owner refusing to make the connection and submitting to the punishment provided for such omission, inasmuch as the Commissioners have no power in such cases to make the connection themselves and to assess the cost thereof against such property.

So that in the application of the law, it can beyond all question be made effective in the one case, and wholly defeated in the other. This objection is not met by the suggestion that repeated fines will force an owner of the latter class to finally make the connection, because if it

turns out otherwise the property remains unconnected and the purpose of the law, namely, the sanitary drainage of lots is defeated.

If the purpose of the law is to be effective as against all the property coming within this act, then the means to make it so must, of course, be found in the act itself, and yet in the situation described, neither the Commissioners nor anybody else would have any power to enforce such connection as against the resident owner who elects to pay the fine rather than comply with the notice. It is apparent that to make the legislation valid, power should be given to the Commissioners to make the connection in all cases, and to pay the cost out of the emergency fund so that the act shall apply equally to all classes of property, and in the absence of such authority this act furnishes no uniform and effective means for its enforcement, and therefore it fails to subserve the purpose of its enactment. To put it differently, in the act under consideration there is apparently one law, namely, a civil one, for owners not found in the District, and another law, namely, a criminal one, for those who are found in the District. As to one class the Commissioners are given the power to make good the requirements of the law by making the connection, while as to the other class such power is withheld from the Commissioners.

If the language of the law is to be interpreted as though it read, that in case the owner or owners of a lot *can not be found* in the District, leaving out the words "be a nonresident or nonresidents of the District," which is the most favorable construction that can be given to the act, we have two separate and distinct classes of persons to which the law has an unequal application so far as their liability is concerned—to the class found in the District, a criminal liability—to the class not so found, a civil liability; and moreover, as already stated, the law is capable of exact enforcement for the purpose

for which it was enacted as to the class of owners not found in the District, while the contrary is true as to those found therein.

To illustrate:

Suppose a row of buildings, some owned by persons found in the District and some owned by persons not so found; as to one class of property, the act can be frustrated by payment of fine, the Commissioners being powerless to do the thing the accomplishment of which is the sole excuse for the existence of the act. As to the other the purpose of the act may be effected; or take that of tenants in common, some residents and the others nonresidents and note what is possible under the act.

The true view is that a valid act should be uniform in its operation and capable of enforcement in respect of *all property.*

Suppose, too, that property belongs to resident minors or insane persons, or persons under other legal disabilities, can this act be enforced against them, or their property?

The act under consideration absolutely lacks uniformity. It follows that it is unconstitutional and void.

The judgment below quashing the tax, no matter by what reasoning it was reached, was therefore right and should be affirmed.

JOHN RIDOUT,
GEORGE C. GERTMAN,
Attorneys for Defendant in Error.

DISTRICT OF COLUMBIA *v.* BROOKE.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 117. Argued April 7, 1909.—Decided May 17, 1909.

Where no objection was made to a technical defect in the return which could have been rectified by amendment had attention seasonably been called thereto, a party who, as disclosed by the record, was not prejudiced, cannot raise the objection at a later date.

Quære, whether there is any distinction between "a parcel" and "a letter" that renders defective a return showing service of statutory notice by mail.

A property owner cannot urge against a statutory drainage system the non-existence of the necessity for drainage, or the fact that he had adopted a system of his own which is either sufficient or better than that required by the law. Such a contention would deny to Congress the right to create any drainage system for the District of Columbia.

The mere existence of dwelling houses, whether occupied or not, indicates the necessity for drainage; and the owner is not deprived of his property without due process of law by a compulsory drainage act because the house happens to be unoccupied at the time.

The police power is one of the most essential of governmental powers,

at times one of the most insistent, and always one of the least limitable.

A wide range of discretion is necessary to make legislation practical and the courts cannot be made a refuge from ill-advised, unjust or oppressive laws.

Quære, and not decided, whether there is any prohibition on Congress from enacting discriminatory legislation, and whether, in the absence of any express prohibition to that effect any prohibition can be implied, especially in regard to the exercise of police power in the District of Columbia. See *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, as to power of Congress to enact discriminatory legislation under the commerce clause of the Constitution.

If the power of Congress to enact discriminatory legislation as to the District of Columbia is limited either expressly or by implication, the prohibition cannot be stricter or more extensive than the due process and equal protection clauses of the Fourteenth Amendment are upon the States.

The Fourteenth Amendment does not deprive the States of the power of classification or require the classification to be logically or scientifically accurate; and sufficient practical reasons exist for a classification of resident and non-resident property owners in the enforcement of police regulations, provided that the act is impartial as between the classes. *Field* v. *Barber Asphalt Co.*, 194 U. S. 618.

While the enforcement of a statute enacted under the police power by criminal proceedings against resident owners, and by civil proceedings against non-resident owners is a discrimination, if, as in this case, it is justified by the circumstances it does not render the statute unconstitutional, nor is it so rendered by the fact that the remedy as to one class may be more efficient than the remedy as to the other.

In determining whether a statute is constitutional suppositions and questions which might possibly arise, but which have not arisen, will be answered when they do arise and affect the operation of the statute.

The act of May 19, 1896, c. 206, 29 Stat. 125, providing for the drainage of the District of Columbia, is not unconstitutional as depriving non-resident owners of their property without due process of law, or denying them the equal protection of the law on account of the different methods provided for enforcing the law against resident and non-resident owners.

29 App. D. C. 563, reversed.

THIS writ was issued to review a judgment of the Court of Appeals, affirming a judgment of the Supreme Court, quash-

ing and vacating certain proceedings taken for the assessment of a drainage tax upon the property of defendant in error under the authority of an act of Congress of May 19, 1896, "An act to provide for the drainage of lots in the District of Columbia." 29 Stat. 125, c. 206, May 19, 1896.

The act provides (1) that each original lot or subdivisional lot in the District of Columbia, where there is a public sewer, shall be connected with such sewer, and where there is a water main, connected with such water main, under certain conditions, which are enumerated. (2) It is made the duty of the Commissioners of the District to notify the owner or owners of every lot required by the act to be connected with a public sewer or water main, as the case may be, to so connect such lot, the work to be done in accordance with the regulations governing plumbing and house drainage in the District. (3) If the owner or owners neglect for thirty days after receipt of notice to make such connections he shall or they shall be deemed guilty of a misdemeanor, and be punished by a fine of not less than one dollar nor more than five dollars for each day of neglect. (4) If the owner be a non-resident of the District or cannot be found therein, the Commissioners shall give notice by publication twice a week for two weeks in some newspaper published in the city of Washington, to such owners, directing the connection of such lot with such sewer or such water main, as the case may be; "Provided, however, that if the residence or place of abode of the said non-resident lot owner be known or can be ascertained on reasonable inquiry, then, and in that case, a copy of the aforesaid notice shall be mailed to said non-resident, addressed to him in his proper name, at his said place of residence with legal postage prepaid; and in case such owner or owners shall fail or neglect to comply with the notice aforesaid within thirty days it shall be the duty of said Commissioners to cause such connection to be made, the expense to be paid out of the emergency fund; such expense, with necessary expense of advertisement, shall be assessed as a tax against such lot, which tax shall be carried on the regular tax

roll of the District of Columbia, and shall be collected in the manner provided for the collection of other taxes."

The petition of defendant in error for certiorari alleges that she is a resident of Maryland and was owner of the property against which the assessment was made at the time the connections were made by the Commissioners. She alleges that the assessment or tax is illegal in its entirety and beyond the power of the respondent (the District) to collect, in this, that the respondent had no jurisdiction of her property, "the said act of Congress being," she further alleges, "unconstitutional and void, because it discriminates between owners of real estate in said District; the said act not being uniform and capable of universal enforcement." She also alleges that the assessment or tax is void in its entirety, because the provisions of the fourth section of the act were not complied with in certain particulars which were set out. We do not give them, because two only are relied on, to wit, that the record does not show that notice was mailed to her as provided by § 4, and that the record fails to disclose that any nuisance existed on her property or that the means of drainage already there were unsanitary or insufficient.

A rule to show cause was issued, to which the District made return. The return was verified by the Commissioners. It denied some of the allegations of the petition, averred the constitutionality of the act and that due and legal proceedings were taken thereunder in making the connections and assessing the tax, including notice to petitioner. To the return were attached, to use the language of the Court of Appeals, "copies of such pertinent official papers and records as were in the custody of the District."

The writ was ordered to be granted. The return to the rule was made the return to the writ. Subsequently, the court, reciting that the cause having been argued by counsel and submitted to the court on the writ of certiorari, and the return thereto filed herein by respondent, adjudged the tax to be "illegal and void," and that it should be "quashed and held

for naught." The respondent was "forthwith directed to cancel the same on its tax records."

The judgment was affirmed by the Court of Appeals. 29 App. D. C. 563.

Mr. F. H. Stephens, with whom *Mr. E. H. Thomas* was on the brief, for plaintiff in error:

The discrimination in this law is not between the resident and non-resident but between those who can be found in the District and those who cannot be found in the District.

"The legislation in question in the present case is that of the Congress of the United States, and must be considered in the light of the conclusion, so often announced by this court, that the United States possess complete jurisdiction, both of a political and municipal nature, over the District of Columbia." *Parsons* v. *District of Columbia*, 170 U. S. 53.

"There is in this District no division of powers between the general and state governments. Congress has the entire control over the District for every purpose of government." *Kendall* v. *The United States*, 12 Pet. 619.

"Congress may legislate within the District, respecting the people and property therein, as may the legislature of any State over any of its subordinate municipalities." *Mattingly* v. *District of Columbia*, 97 U. S. 687.

The discrimination made in the statute is not between residents and non-residents. Section 4 of the statute, by its express terms, in the opening sentence distinguishes only between resident owners who can be found and resident or non-resident owners who cannot be found.

The test of the application of § 4 is whether the property owner can be found in the District, and that is the question presented in the record. Indeed, the opinion practically states this. It says:

"If he lives in the District or can be found here, his premises may not be molested but he may be fined. If he cannot be found here the object of the law is easily effectuated and

the expenses connected therewith become a charge upon the lot."

"The fact that the mode prescribed for the non-resident may be more inconvenient than that prescribed for the resident is not because the statute intends to make a discrimination, but because of the situation of the parties, and because, in the judgment of the law-making power, no other as effective way could be adopted for the protection of the public." *McFadden* v. *Blocker*, 58 L. R. A. 898.

If any distinction has been made by the Court of Appeals between residents and non-residents, such distinction does not exist under this statute because it treats absent residents and non-residents alike. There is no discrimination against the non-resident owner solely because he is a non-resident.

Even where personal liberty was involved a similar statute was held constitutional. *Frost* v. *Brisbin*, 19 Wend. 11. (This case has been cited and followed by the Court of Appeals in *Howard* v. *The Citizens' Bank & Trust Co.*, 12 App. D. C. 222, 235, and *Robinson* v. *Morrison*, 2 App. D. C. 105, 128.)

If it be thought that the discrimination is between residents and non-residents, nevertheless the discrimination is a reasonable one.

It is a matter of common knowledge in the legal profession that statutes exist in nearly every State of this country permitting an attachment against the property of non-residents, real and personal, in actions *ex contractu*, before any adjudication of the debt is had, where none is permitted against the resident.

Also, laws discriminating against non-residents in other matters are not uncommon and the courts are constantly enforcing them. *Central Loan & Trust Co.* v. *Campbell Commission Co.*, 173 U. S. 84; *Allen* v. *Wyckoff*, 48 N. J. L. 90; *Chemung Canal Bank* v. *Lowery*, 93 U. S. 72; *Field* v. *Barber Asphalt Co.*, 194 U. S. 618; *Savannah &c., Ry.* v. *Savannah*, 198 U. S. 392; *Hawley* v. *Hurd*, 72 Vermont, 122; *McFadden* v. *Blocker*, 54 S. W. Rep. 872; *Tatem* v. *Wright*, 23 N. J. L.

429; *Connecticut* v. *Insurance Co.*, 73 Connecticut, 255; *Cribbs* v. *Benedict*, 64 Arkansas, 555.

There is no unlawful discrimination in the remedy which may be used to enforce the doing of the work prescribed by the act. All owners may be required to do such work. *Schmidt* v. *Indianapolis*, 168 Indiana, 631.

That the non-resident owner who cannot be found cannot be fined is of no importance.

The statute is effective and may be enforced against all persons by civil process, notwithstanding its penal provisions.

The fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate the nuisance. *Carlton* v. *Rugg* (Mass.), 5 L. R. A. 193.

The duty to make said connections having been imposed on all owners and the duty of requiring all owners to do the work having been cast on the Commissioners by the statute, why cannot the obligations of the statute be enforced by mandatory injunction?

A bill in equity is maintainable by the Commissioners of this District in their own names as Commissioners for a mandatory injunction to compel a person, whose license to temporarily occupy a portion of a public avenue and parking has been revoked, to remove a structure used as a refreshment stand from such avenue and parking. *McBride* v. *Ross*, 13 App. D. C. 576.

Also to remove a show-window. *Guerin* v. *Macfarland*, 27 App. D. C. 478.

The owner cannot remain silent while work is being done, of which he has notice, and then, after it is completed and his property benefited, be heard to complain that the proceedings are illegal.

"It is a general rule, now fully accepted in this State, that where the owner of property subject to assessment for public improvements, stands by and makes no objection to such improvements, which benefit his property, he may not deny the authority by which the improvements are made, or defeat

the assessments made against his property for the benefits derived; and that this is true both where the proceedings for the improvement are attacked for irregularity, and where their validity is denied, but color of law exists for the proceedings." *Commissioners* v. *Plotner*, 149 Indiana, 116, 119, cited in 2 Cooley (3d ed.), p. 1515, with many other cases from Indiana, Iowa, Kentucky, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New York, Oregon and Pennsylvania. Approved in *Wight* v. *Davidson*, 181 U. S. 371, 377.

Mr John Ridout, with whom *Mr. George C. Gertman* was on the brief, for defendant in error:

The act of Congress here in question is unconstitutional and void. This contention is based upon certain salient vices in the act which are apparent on its face, of which the principal are:

(*a*) The attempt to give controlling evidential effect to the mere existence of an improvement in case of improved property, and to the *ex parte* certificate of the health officer in the case of unimproved property, thus violating the "due process" clause of the Constitution.

(*b*) Because the act lacks the requisite uniformity inasmuch as it undertakes to provide one law for property of resident and another for property of non-resident owners in said District.

(*c*) Because the act is not capable of universal enforcement, and creates unequal burdens.

(*d*) Because the act is incapable of uniform enforcement as against all property in the District of Columbia.

Perusal of the act will clearly disclose the absolute lack of uniformity which is essential to the validity of such an act even though it be considered that it embodies a lawful exercise of the so-called police power, under the guise of which so many attacks have been made upon the due process and uniformity clauses in the Constitution.

The invalidity of such an act has been shown in the opinion

in *McGuire* v. *District of Columbia*, 24 App. D. C. 22. That case involved the validity of the snow and ice law which the court declared to be most beneficial in its purpose and which the court expressed its desire to sustain, yet it found itself unable to do so, and by unanswerable reasoning determined upon the grounds stated in the opinion that the act was unconstitutional. See, also, *Heylman* v. *District of Columbia*, 27 App. D. C. 563.

The act involved in this case is far more vicious in form.

If the purpose of the law is to be effective as against all the property coming within this act, then the means to make it so must, of course, be found in the act itself, and yet in certain situations neither the Commissioners nor anybody else would have any power to enforce such connection as against the resident owner who elects to pay the fine rather than comply with the notice. It is apparent that to make the legislation valid, power should be given to the Commissioners to make the connection in all cases, and to pay the cost out of the emergency fund so that the act shall apply equally to all classes of property, and in the absence of such authority this act furnishes no uniform and effective means for its enforcement, and therefore it fails to subserve the purpose of its enactment. To put it differently, in the act under consideration there is apparently one law, namely, a civil one, for owners not found in the District, and another law, namely, a criminal one, for those who are found in the District. As to one class the Commissioners are given the power to make good the requirements of the law by making the connection, while as to the other class such power is withheld from the Commissioners.

If the language of the law is to be interpreted as though it read, that in case the owner or owners of a lot cannot be found in the District, leaving out the words "be a non-resident or non-residents of the District," which is the most favorable construction that can be given to the act, we have two separate and distinct classes of persons to which the law has an unequal application so far as their liability is concerned—to the

class found in the District, a criminal liability—to the class not so found, a civil liability; and moreover, as already stated, the law is capable of exact enforcement for the purpose for which it was enacted as to the class of owners not found in the District, while the contrary is true as to those found therein.

MR. JUSTICE MCKENNA, after making the foregoing statement, delivered the opinion of the court.

Defendant in error, to sustain her contention that the record does not show notice to her of the proposed work, says that it shows only that a "parcel" was mailed to her, not a letter, and that the contents of the parcel are not disclosed. To the extreme technicality of this contention the Court of Appeals answered that no objection was made to the return, and that it averred that the officers and agents of the District made diligent search for defendant in error in the District, and that she could not be found there, and that plaintiff in error believed that she was a citizen and resident of the State of Maryland. The court also pointed out that the return alleged that notice was given to her by publication, as required by the act of Congress, and by registered letter, postage prepaid, which was received by her. A registry return receipt, with her signature attached thereto, was made part of the return. Commenting on this, the court said that if there was a defect in the return it was purely technical, and could have been corrected. "Upon the granting of the writ," the court observed, "had objection been made to the adoption by the Commissioners of their preliminary return, the court undoubtedly would have permitted an amendment to the record for the purpose of supplying the defects now complained of by petitioner [defendant in error here.] Having then made no objection to the form of the return, it is too late to do so now." If we could concede that the record justifies the distinction made by defendant in error between a parcel and a letter, we should adopt without hesitation the reply made by the Court

of Appeals to the contention based on that distinction, or upon any defect in the return, which could have been removed if objection had been seasonably made.

The second contention of defendant in error is that the record fails to disclose that any nuisance existed on her property, or that the means of drainage already there was unsanitary or insufficient, or that any necessity existed for making the connection. This contention seems to be made in this court for the first time. It certainly received no notice from the Court of Appeals, and the fact that it assumes that there was means of drainage on defendant in error's lot is not alleged in her petition. But suppose the fact had been alleged, a property owner cannot urge against the drainage system of the District that he had adopted a system of his own and challenge a comparison with that of the District, and obey or disobey the law according to the result of the comparison. The contention virtually denies any power in Congress to create a system of drainage to which a lot owner must conform.

Finally, defendant in error attacks the validity of the law, and bases the attack, to use her words, "upon certain salient vices in the act which are apparent on its face, of which the principal are—

"(*a*) The attempt to give controlling evidential effect to the mere existence of an improvement in case of improved property, and to the *ex parte* certificate of the health officer in the case of unimproved property, thus violating the 'due process' clause of the Constitution.

"(*b*) Because the act lacks the requisite uniformity, inasmuch as it undertakes to provide one law for property of resident and another for property of non-resident owners in said District.

"(*c*) Because the act is not capable of universal enforcement, and creates unequal burdens.

"(*d*) Because the act is incapable of uniform enforcement as against all property in the District of Columbia."

The first objection was not expressed in the petition nor

made in the lower courts, and we might therefore decline to entertain it. At best, defendant in error can only be heard against "the evidential effect of the mere existence of an improvement," because her property does not come within the category of unimproved property. Her improvements are dwelling houses, and their mere existence indicated the necessity for drainage. That they may sometimes be vacant is unimportant. What rights owners of lots differently improved or owners of unimproved property may have is of no concern of defendant in error. Her contention, therefore, that the act deprives her of due process of law is unsound.

The other objections expressed the same fundamental idea, to wit, that the act discriminates between resident and nonresident owners of property, and because it does it is void. The Court of Appeals yielded to this contention, following the authority of *McGuire* v. *District of Columbia*, 24 App. D. C. 22.

The defendant in error asserts this discrimination and argues its consequences at some length, but does not refer to any provision of the Constitution of the United States which prohibits Congress from enacting laws which discriminate in their operation between persons or things. If there is no express prohibition of such power, may prohibition be implied from our form of government? Upon that proposition we need not express an opinion. If prohibition exists it must rest on all the powers conferred by the Constitution. This court, however, has just held, in the case of *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, that Congress may in the exercise of the powers to regulate commerce among the States, discriminate between commodities and between carriers engaged in such commerce. And it was said that the assertion that "injustice and favoritism" might "be operated thereby," could "have no weight in passing upon the question of power." In the case at bar we are dealing with an exercise of the police power, one of the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.

However, the question of the power of Congress, broadly considered, to discriminate in its legislation is not necessary to decide, for whether such power is expressly or impliedly prohibited, the prohibition cannot be stricter or more extensive than the Fourteenth Amendment is upon the States. That Amendment is unqualified in its declaration that a State shall not "deny to any person within its jurisdiction the equal protection of the laws." Passing on that Amendment, we have repeatedly decided—so often that a citation of the cases is unnecessary—that it does not take from the States the power of classification. And also that such classification need not be either logically appropriate or scientifically accurate. The problems which are met in the government of human beings are different from those involved in the examination of the objects of the physical world and assigning them to their proper associates. A wide range of discretion, therefore, is necessary in legislation to make it practical, and we have often said that the courts cannot be made a refuge from ill-advised, unjust or oppressive laws. *Billings* v. *Illinois*, 188 U. S. 97; *Heath & Milligan Manufacturing Co. et al.* v. *Worst*, 207 U. S. 338. In the light of these principles the contentions of defendant in error must be judged. The act in controversy makes a distinction in its provision between resident and non-resident lot owners, but this is a proper basis for classification. Regarded abstractly as human beings, regarded abstractly as lot owners, no legal difference may be observed between residents and non-residents, but regarded in their relation to their respective lots under regulating laws, the limitations upon jurisdiction, and the power to reach one and not the other, important differences immediately appear. We said in *St. John* v. *New York*, 201 U. S. at pages 633, 637, not only the purpose of a law must be considered, but the means of its administration—the ways it may be defeated. Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose. This was in effect repeated in *Field* v. *Barber Asphalt Co.*, 194 U. S. 618, where a privilege to protest

against a street improvement given by the statute assailed to resident property owners and denied to non-resident property owners, was sustained, and the statute held not to violate the equality clause of the Fourteenth Amendment. See *Travellers Ins. Co.* v. *Connecticut*, 185 U. S. 364.

It is not contended that the act of Congress is not impartial within the classes. The act treats all resident lot owners alike and all non-residents alike. It is contended that there is a difference in the procedure prescribed in case of default, and non-resident lot owners are thereby discriminated against, though they stand in the same relation to the purpose of the law as resident lot owners. In other words, non-resident lot owners are not treated the same as resident owners in like situation, because against resident owners the coercion of the law is by criminal punishment, while against non-resident owners the remedy is by civil proceedings, the District does the work that the non-resident owners neglect and charges the expense thereof on their property. This is a distinction, a discrimination it may be called, but it has even more justification than that sustained in *Field* v. *Barber Asphalt Co.*, *supra*. The statute under consideration in the case at bar enjoins a duty on both resident and non-resident lot owners, a duty necessary to be followed to preserve the health of the city. There is a difference only in the manner of enforcing it, a difference arising from the different situation of the lot owners, and therefore competent for Congress to regard in its legislation. In other words, under the circumstances presented by this record the distinction between residents and non-residents is a proper basis for classification. It might not be under other circumstances. *Blake* v. *McClung*, 172 U. S. 239; *S. C.*, 176 U. S. 59; *Sully* v. *American National Bank*, 178 U. S. 289.

That the remedy in the statute under consideration against non-resident owners may be more efficient—more completely fulfill the purpose of the law—than that against resident owners, is beside the question. Indeed, the fact may be disputed. Usually the most emphatic and efficient enforcement

of a law is through criminal prosecution. At any rate, it is hard to believe that there will be many resident lot owners whose delinquency under the statute will be so resolute that it will stand against repeated charges of crime and the consequent penalties. But, be that as it may, it was for Congress to decide whether such possibility should be risked rather than incur the greater possibility of more delinquents in so numerous a class as resident lot owners if the District was to first bear the expense of the drainage and collect it afterward by civil proceedings.

Other criticisms are made of the law to display what is alleged to be its lack of uniformity. For instance, a supposition is made of tenants in common, some of whom are residents and the others non-residents, and the possible difficulties that may arise from such ownership under the act, and it is asked if the property belongs to resident minors or insane persons, or persons under legal disabilities, can the act be enforced against them or against their property? To these suppositions and questions we answer that it will be time enough to reply when a case arises in which they are presented, and to determine then the operation of the act upon the persons enumerated.

Judgment reversed with directions to reverse the judgment of the Supreme Court, quashing the tax, and to dismiss the petition.

MR. JUSTICE WHITE did not hear the argument and took no part in the decision.